Petition

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI, JOSEPH F. RAUH, JR.,
LEON DESPRES, KENNETH YABLONSKI,
JUDITH SCHNEIDER,

and

RAYMOND DONOVAN, Secretary of Labor,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether in an action to set aside a union election brought by the Secretary of Labor under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 a "common benefit" attorneys' fee award to a private intervenor is inconsistent with, and therefore precluded by, the remedial scheme of Title IV.

2. If not:

(A) Whether the "common benefit" doctrine requires a claimant seeking an attorneys' fee award to prove as an element of his fee claim that but for his legal services the asserted benefit would not have been realized.

(B) Whether the "common benefit" doctrine, which allows an attorneys' fee award, only where the award "operate[s] to spread the cost of litigation proportionately among the beneficiaries," permits a fee award where the client for whom the legal services were performed has realized a unique benefit from the litigation (in this case, a high union office with a substantial salary), a small portion of those who would be required to pay the fee realized at best a less substantial benefit (here, the opportunity to vote in a rerun election in their district of the union), and any benefit received by the overwhelming majority of those who would be required to pay the fee (i.e., those union members outside the district in which the rerun election was conducted) was still less substantial.

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RAYMOND DONOVAN, Secretary of Labor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner United Steelworkers of America, AFL-CIO-CLC, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 16, 1981, and amended on January 7, 1982.

OPINIONS BELOW

The first opinion of the district court, and the report of the magistrate which was adopted by the district court, are unreported and are reprinted as Appendices G and H in the separately bound Appendix to the Petition. The opinion of the court of appeals on the first appeal is reported at 554 F.2d 586 and is reprinted as

Appendix E. A supplementary opinion of that court, issued in conjunction with the denial of a post-decision motion, is unreported and is reprinted as Appendix F. The order of this Court denying a writ of certiorari, and the dissenting opinion of Justice White (joined by Justices Stewart and Rehnquist) are reported at 435 U.S. 977, and are reprinted as Appendix D. The report of the magistrate on remand is unreported and is reprinted as Appendix C; the opinion of the district court on remand, adopting the magistrate's report, is reported at 501 F.Supp. 912, and is reprinted as Appendix B. The opinion of the court of appeals on the second appeal is reported at 666 F.2d 845, and is reprinted as Appendix A. The judgment and amended judgment of the court of appeals are unreported and are reprinted as Appendices I and J.

JURISDICTION

The court of appeals entered its judgment on December 16, 1981, and an amended judgment on January 8, 1982. On March 5, 1982, Justice Brennan entered an Order (App. K), extending the time for filing the petition to April 15, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 402 and 403 of the LMRDA, 29 U.S.C. §§ 482, 483, are reprinted as an appendix at the back of this petition.

STATEMENT OF THE CASE

Introduction

This case began in November, 1973, as an action by the Secretary of Labor under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* ("LMRDA"), to set aside the 1973 election for district director of District 31 of the United Steelworkers of America ("USWA"). Edward Sadlow-

ski, the defeated candidate in the election, was granted leave to intervene. Approximately eight months after suit was filed, the Department of Labor ("DOL") and USWA agreed to resolve the case by holding a DOL-supervised rerun of the disputed election.

Since that time, the case has continued as an effort by the four attorneys for intervenor Sadlowski to obtain an award of fees from the membership of the USWA under the "common benefit" exception to the American rule against the shifting of fees. The case has been before the United States Court of Appeals for the Third Circuit on two occasions, and has resulted in a judgment from that court directing the district court to award fees. USWA seeks review of that judgment here.

Statement of Facts

In February, 1973, USWA conducted elections for district directors of the 25 districts (i.e., geographic regions) into which the Union is divided. After the elections, Sadlowski—the defeated candidate for director of District 31—protested the District 31 election in accordance with USWA's internal procedures for resolving election contests. Sadlowski's protest was denied by USWA.

Sadlowski then submitted a complaint to the Secretary of Labor under Title IV of the LMRDA. The Secretary investigated the challenged election, assigning 19 investigators to the case full-time who interviewed hundreds of witnesses in over 8,600 hours of investigation (App. 26a). Based on the results of the investigation, the Secretary instituted a suit to overturn the election.

Sadlowski was granted leave to intervene to protect his personal interest *qua* candidate in accordance with this Court's decision in *Trbovich* v. *Mine Workers*, 404 U.S. 528. Sadlowski's compiaint-in-intervention added no substantive allegations to the Secretary's complaint, but requested eight items of additional relief.

Approximately eight months after suit was filed, the DOL and USWA agreed to resolve the case, without any admission of violation, by holding a DOL-supervised rerun election in District 31. Neither Sadlowski nor his attorneys participated in negotiating the settlement and they declined to join it, terming it, in a document filed with the district court, "totally inadequate" and "an unconscionable denial" of Sadlowski's rights, and proposing eight modifications in the agreement (paralleling the items of relief sought in Sadlowski's complaint).[1] With one minor change, the district court approved the settlement agreement as submitted. As approved, the agreement contained none of the relief requested either in Sadlowski's complaint or in his objections to the settlement. In November, 1974, a new election was held under DOL supervision which Sadlowski won. Sadlowski was thereafter installed as District Director.

In January, 1975, respondents filed a "Verified Application" requesting that they be awarded approximately $500,000 in attorneys' fees from the USWA treasury. That treasury contains the dues of USWA's 1,400,000 members throughout the United States and Canada, including the 130,000 members within District 31.[2] Respondents premised their fee claim on the "common benefit" exception to the American rule against fee shifting, contending that the rerun of the District 31 election had benefited the USWA membership as a whole and that respondents were responsible for conferring that benefit.

USWA moved to dismiss the fee application on two grounds. First, USWA argued that an award of fees to a private intervenor in a Title IV action is inconsistent

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[1] The document referred to in text is reprinted in volume one of the Joint Appendix filed in the court of appeals at 233-39. (That Appendix is hereinafter cited as "—— JA ——.")

[2] Districts in the USWA are administrative subdivisions of the International Union and do not have treasuries of their own.

with, and thus is precluded by, the remedial scheme of Title IV. Second, USWA urged that, in any event, respondents' fee application did not state a basis for a common benefit fee award from USWA's treasury as the application revealed that the "benefit" that allegedly was conferred by respondents was not "common" to all of USWA's members but was conferred principally upon Sadlowski, who won an important union office (with a $35,000 salary), and secondarily on those USWA members within District 31 who had received the "benefit" of a new election to choose their District Director; USWA contended that the application alleged no benefit to the over 90% USWA members who are outside of District 31 and who would bear the major share of any fee award against USWA's treasury.

The district court sustained both of USWA's contentions and dismissed the fee application (App. 154a-73a). Respondents appealed.

On the first appeal, a divided panel of the court of appeals reversed. That court overturned the district court's statutory preclusion ruling, holding that a common benefit fee award "is wholly consistent with Title IV of the LMRDA" (App. 117a; *see* pp. 11-12, *infra*). And the appelate court further found respondents' fee application sufficient to state a common benefit fee claim (App. 117a-35a; *see* p. 22, *infra*). Accordingly, the court remanded the case for a determination of "[w]hether an award is warranted and, if so, the amount of such award" (App. 136a).

USWA petitioned this Court for a writ of certiorari, raising both the statutory preclusion and no-common-benefit issues. Respondents opposed the petition (Br. at 4) on the ground, *inter alia*, that since "no attorneys' fees have yet been awarded" and since the appellate court had "simply ruled that fees are permissible here, . . . [r]eview by this Court in such circumstances would be wholly premature and unwarranted." This Court denied the petition for certiorari. Justice White filed a dissenting opin-

ion in which Justices Stewart and Rehnquist joined suggesting that both questions merited review (App. 89a-98a; *see* p. 7, *infra*).

On remand, the case was referred to a magistrate and was submitted for decision on the basis of the voluminous record developed on remand (including transcripts of 11 depositions, 13 affidavits, and over 250 exhibits) as well as on the presettlement record.

The Magistrate issued a report recommending that the fee claim be denied. The Magistrate concluded, as a matter of law, that entitlement to a common benefit award requires " 'a proven causal relationship between the efforts of counsel and the benefits allegedly derived therefrom' "—that is, a showing that but for counsels' efforts the benefit would not have been realized (App. 88a). And the Magistrate found, as a matter of fact, that respondents had failed to meet that requirement.

Respondents filed exceptions to the Magistrate's report with the district court. That court overruled these exceptions, endorsing the Magistrate's legal premise and "adopt[ing] his recommendations as my findings of fact" (App. 22a).

Respondents again appealed to the Third Circuit, which reversed the district court's judgment in part. The court of appeals accepted as "law of the case" the legal rulings on the first appeal, albeit acknowledging the "closeness of the issue[s]" that had been decided on that appeal (App. 2a, n.1). With respect to the questions addressed on remand, the court below concluded that the Magistrate and district court had committed legal error by requiring respondents to establish—as an element of their fee claim—that but for counsels' efforts the benefit that was allegedly conferred on the USWA membership would not have been realized. The court held that counsel were entitled to a fee award from USWA's members, under the common benefit doctrine, if their ac-

tivities were of "material assistance to the Department of Labor" in the prosecution of the case (App. 13a; *see id.* 10a), regardless of whether the benefit conferred upon USWA's members would have been realized even in the absence of counsels' activities.

Applying the "material assistance to DOL" standard, the court of appeals overturned the denial of fees with respect to work done by counsel for Sadlowski during the period that Sadlowski exhausted his internal union remedies and submitted a complaint to the Secretary, but upheld the denial of fees with respect to work done by counsel for Sadlowski thereafter. The Court remanded the case to the district court "for a determination of the amount of attorney's fees to be awarded" (App. 17a).[3]

REASONS FOR GRANTING THE WRIT

USWA sought certiorari from the first decision of the court of appeals in this case, which reversed the district court's dismissal of the fee application for failure to state a claim. At that interlocutory stage of the case, this Court declined to grant certiorari. In a dissenting opinion, Justice White, joined by Justices Stewart and Rehnquist, stated that "[t]he issues presented in this case are of serious importance to the proper enforcement of the LMRDA, and also to the prosecution generally of private claims that benefit a broad class of persons" (App. 89a),[4] and that "[b]oth holdings of the lower court appear to conflict with this Court's decisions" (App. 92a).

On the second appeal, the court below, in directing an award of attorneys' fee, adhered to its earlier rulings as "law of the case," albeit recognizing the "closeness of the

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[3] On remand, the parties recently have submitted memoranda to the district court concerning the amount of fees to be awarded under the appellate court's decision; the matter is now pending before the district court for decision.

[4] The court of appeals likewise recognized that the case "presents important problems in the administration of Title IV" (App. 94a).

issues" (App. 2a n.1). As the case now stands, therefore, the two issues raised by the first decision of the court of appeals are still present: (1) whether a "common benefit" attorneys' fee award to the lawyers representing a private intervenor in an action brought by the Secretary of Labor under Title IV of the LMRDA is inconsistent with, and therefore precluded by, the remedial scheme of Title IV; and (2) whether a "common benefit" award is appropriate when the intervenor receives a significant tangible benefit from the suit that no one else receives and when 90% of those to be charged with the fee are unaffected by the relief granted in the suit. The second decision of the court of appeals raises an additional issue as well: whether a "common-benefit" fee claimant must establish that "but for" his efforts those from whom he is seeking a fee would not have received the benefits for which he is claiming credit.

All three of these issues warrant plenary review by this Court. The first—the statutory preclusion issue—has arisen frequently in recent years, and generated conflicting lower court decisions.[8] Moreover, the result reached by the Third Circuit on this issue is contrary to the remedial scheme of Title IV, to the congressional policies underlying that scheme, and to this Court's decision in *Trbovich v. Mine Workers*, 404 U.S. 528, which carefully limits the role of intervenors in Title IV cases in order not to jeopardize those congressional policies. *See* pp. 9-16, *infra*.

With respect to both the second and third issues—the "common benefit" issues—the decision of the court below is inconsistent with principles established by this Court

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[8] *See Donovan v. Teamsters Local 70*, 661 F.2d 1199, 1203 (9th Cir. 1981); *Usery v. Teamsters Local 639*, 543 F.2d 369 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123; *Donovan v. Teamsters Local 326*, No. 79-514 (D. Del., Feb. 1, 1982); *Marshall v. Teamsters Local 20*, 509 F.Supp. 926 (N.D. Ohio 1981); *Donovan v. Machinists Local Lodge 79*, 109 LRRM 2584 (W.D. Wash. 1981); *Brennan v. UAW Community Action Program*, 86 L.R.R.M. 3188 (D. Conn. 1974).

and is in square conflict with decisions of other circuits. Indeed, by loosing the common benefit exception to the American rule against fee shifting from its rationale, the lower court resurrects under the rubric of that exception the "private attorney general" exception rejected by this court in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240. *See* pp. 16-24, *infra*.

I. The Statutory Preclusion Issue

(a) *Alyeska* reaffirms the American rule "that attorney's fees are not ordinarily recoverable. . . ." from the opposing party, 421 U.S. at 257, quoting *Fleishchmann Corp. v. Maier Brewing*, 386 U.S. 714, 717. This Court has recognized certain equitable exceptions to the American rule against fee-shifting, including the common benefit exception, but has held that these exceptions do not apply in statutory causes of action where an award of attorneys' fees would not be consistent with the remedial scheme established by Congress. *Fleischmann Corp. v. Maier Brewing, supra; Hall v. Cole*, 412 U.S. 1, 9-19. Title IV of the LMRDA establishes a remedial scheme that leaves no room for a private claim for attorneys' fees.

Title IV provides a "comprehensive procedure for enforcing [its substantive] rules." *Trbovich, supra*, 404 U.S. at 531. Pursuant to that scheme *only* the Secretary has the power to bring a post-election suit challenging a union election. 29 U.S.C. §§ 482, 483. By design, Congress prohibited private litigants from initiating lawsuits to challenge completed union elections, "reject[ing]," as the court below acknowledged, "a bill, H.R. 8342, 86th Cong., 1st Sess. § 402(a) (1959), which provided for union members suits under Title IV, and authorized the award of appropriate relief, including attorneys' fees" (App. 100a). The prohibition on suits by private litigants resulted from a congressional concern that, otherwise, courts could be used, particularly by defeated candidates, to disrupt union self-government, and unions would be

vulnerable to the harassment and expense incident to defending against such private litigation.[6]

Further, Congress specified in "meticulous detail[]" (*Fleischmann, supra*, 386 U.S. at 719) the relief that may be obtained in a Title IV post-election suit brought by the Secretary (29 U.S.C. § 482(c)):

> "The court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization."

The remedy is public in nature; no private or individual relief is provided. And, in 29 U.S.C. § 483, Congress declared that "[t]he remedy provided by [Title IV] for challenging an election already conducted shall be exclusive."

The remedial provisions of Title IV just described stand in marked contrast to those of the other titles of the LMRDA. All other titles authorize private suits by individual union members, and either expressly authorize an award of attorneys' fees in such suits or, by authorizing "such relief (including injunctions) as may be appropriate," give courts a "broad mandate" permitting awards of attorneys' fees pursuant to equitable exceptions such as the common-benefit doctrine. *See Hall v. Cole, supra*, 412 U.S. at 11.[7]

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[6] *Trbovich v. Mine Workers, supra*, 404 U.S. at 530-537; *Dunlop v. Bachowski*, 421 U.S. 560, 568-570; *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 470-472; *Calhoon v. Harvey*, 379 U.S. 134, 140.

[7] In Title I (bill of rights of union members), Congress relied for enforcement upon civil suits brought by individual union members "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412. In Title II (reporting), Congress also relied upon union members for enforcement, and expressly provided that:

(b) In the face of this statutory scheme, which manifests a clear congressional intent to preclude private suits and private remedies in the post-election enforcement processes of Title IV, the court below, on the first appeal —and on the second appeal as "law of the case"—nevertheless found that permitting a private intervenor to assert a fee claim and to obtain an award of attorneys' fees in a Title IV action is consistent with congressional intent. The court found that *Hall v. Cole, supra*, and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, "enunciated a presumption against preclusion" of the judicial authority to make fee awards (App. 101a). And in determining whether this "presumption" was overcome here, the court below looked not to the language or legislative history of Title IV, which provide it no comfort, but to what it called "supplement[s]" to and "expansion" (App. 104a) of the structure of Title IV resulting from this Court's decision in *Trbovich*, which the court below saw as working a fundamental change in the statutory scheme of Title IV. In the view of the court below:

> Before the *Trbovich*-intervenor existed, the statutory scheme involved only one party truly comporting itself in an adversarial posture: the union. But since *Trbovich* the "union interest" is defined by two parties with adverse viewpoints—even if their interest in the union remains a common denominator. The Secretary, in this circumstance, occupies a more tenable position since he has not only his own expertise

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"The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorneys fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 431(c). In Title III (union trusteeships), Congress created for individual union members a civil cause of action "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 464(a). In Title V (fiduciary responsibility of union officers), Congress not only gave union members a right to bring suit, after exhaustion of internal union remedies, for "damages . . . an accounting or other appropriate relief," but in addition specified that attorneys fees and expenses may be allowed as part of that relief, 29 U.S.C. § 501(b).

> in the field, but, in addition, the benefit of the crystallization and presentation of issues and viewpoints we associate with the adversary process. The intervenor's role created by *Trbovich* is thus that of an adversary to the union in developing the facts and the legal issues. What the issue of statutory preclusion of the exercise of equitable powers boils down to in this context is the question of how empty a role the Supreme Court intended to create. Considering the complexities of internal union remedies, complaint to the Secretary, and recourse to the courts, and the penalties for lack of legal or technical sophistication, we cannot believe that intervenors were intended to proceed *pro se*. . . . [C]ourts and legislatures do not ordinarily create roles—strong roles—and then deny their existence by refusing to recognize the existence of the means to fulfill them effectively. [App. 116a]

Thus the court found fee awards to be consistent with—indeed compelled by—*Trbovich*.

We doubt that *Hall* and *Mills* create "a presumption against preclusion."[8] But even if they do, the language

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[8] The *Fleischmann* Court stated, "[w]hen a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." 386 U.S. at 720. While the court below thought that *Fleischmann* had been "substantially undercut" (App. 100a) by *Hall* and *Mills*, neither of those cases qualified the quoted proposition from *Fleischmann*. Rather, *Hall* and *Mills* each undertook an inquiry as to whether importation of the remedy of attorneys' fees was *consistent* with the applicable statutory scheme—the inquiry which *Fleischmann* mandates.

The majority below predicated its analysis on bits and pieces of language taken out of context from *Hall*. A more pertinent reference to *Hall* is at the point where this Court stated the holding on this issue:

> We therefore hold that the allowance of counsel fees to the successful plaintiff in a suit brought under § 102 of the LMRDA is *consistent* with . . . the Act. . . . [412 U.S. at 14 (emphasis added)]

[Footnote continued on page 13]

and history of Title IV, properly understood, overcome that presumption. For, as we have seen, the language, history, and purpose of the statute leave no room for a private claim for attorneys' fees in a Title IV action.

The court below apparently saw these statutory materials as beside the point, given its view that *Trbovich* had worked a basic change in the enforcement scheme of Title IV.[9] But *Trbovich* created no such change; to the contrary, it marked out an unusually limited role for a private intervenor in order not to jeopardize Congress' ob-

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[8] [Continued]

The *Hall* Court was able to find a fee award consistent with Title I of the LMRDA for two reasons, neither of which applies here. First, the Court found that "[u]nlike § 35 of the Lanham Act"—the section involved in *Fleischmann*—the remedial provision of Title I "broadly authorizes the courts to grant 'such relief (including injunctions) as may be appropriate'" and thus "does not 'meticulously detail the remedies available to a plaintiff.'" 412 U.S. at 10-11. As we have seen, there is no such "broad[] author-iz[ation]" in the post-election remedial provisions of Title IV; rather the remedies are "meticulously detail[ed]."

Second, the *Hall* Court found that the enforcement of Title I is dependent upon the ability of "an aggrieved union member . . . to finance litigation." 412 U.S. at 14. The enforcement of Title IV is not so dependent; indeed, Congress has vested exclusive authority to bring suit in the Secretary of Labor. The aggrieved member's only obligation is to protest the election within his union and to the Secretary. And as this Court has made clear, this protest was intended to be a "layman's complaint," *Wirtz v. Laborers Union*, 389 U.S. 477, 482 which may be "inartful" or "use broad or imprecise language," *Hodgson v. Steelworkers*, 403 U.S. 333, 340-41.

[9] The court stated:

> The question is not whether a union member is entitled to recover attorney's fees under the statute alone, where the role prescribed for him is complaint to the Secretary after exhaustion of internal union procedures. The question is what relief a union member is entitled to after having intervened in and partiicpated in the prosecution of an action brought by the Secretary under Title IV *in the manner anticipated by the Supreme Court in Trbovich*. [App. 104a; emphasis in the original]

jectives in shaping Title IV. The flaw in the lower court's reading of *Trbovich* was explained in the dissenting opinion from the earlier denial of certiorari in this case:

> *Trbovich* held that the union member who initiated the challenge might still intervene in the federal suit, "so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint." *Trbovich, supra*, at 537. This conclusion represented a very careful balance between Title IV's commitment of enforcement authority to the Secretary's sole discretion, and a recognition that the union member who originally raised the complaint might wish to see his claims pressed in some manner different from that of the Secretary.
>
> The opinion below threatens to upset that delicate compromise. Intervention by union members in support of the Secretary's grounds of complaint was upheld in *Trbovich* only because it would make the union liable "to relatively little additional burden," and would "not subject the union to burdensome multiple litigation, nor will it compel the union to respond to a new and potentially groundless suit." *Trbovich, supra*, at 536. Once attorney's fees are assessable against a union on behalf of intervenors, however, the union has indeed become liable to an "additional burden" that could be quite costly. And the adjudication of whether an intervenor has contributed significantly to the common benefit of all union members could well involve the "burdensome multiple litigation" that the restrictions on intervention imposed by *Trbovich* were intended to avoid. [App. 90a]

The validity of these observations is confirmed by the experience in this very case. Respondents' Fee Application added to this case an entirely new claim, predicated upon thirty-nine pages of factual allegations set forth in the Application. Some of those allegations—such as the allegation that the original election had been tainted by illegalities (the allegation on which respondents rested their contention that the rerun election had

constituted a benefit to USWA members within District 31)—had been made by the Secretary in his complaint but had been left expressly unresolved by the settlement agreement. Other allegations—such as the allegation that misdeeds had been committed by officers of the USWA outside District 31 (the allegation on which respondents rested their contention that the settlement benefited USWA members outside of District 31 by deterring USWA officers from repeating their methods in other districts)—had been made by Sadlowski in his complaint to the Secretary, but had not been included in the Secretary's complaint in district court. And still other allegations—those concerning the asserted failures of the Secretary properly to perform his duties during the investigation and prosecution of this case—were wholly new allegations, requiring USWA to defend the adequacy of the Secretary's performance. The resulting litigation over these allegations has been massive, time-consuming, and costly.

Subjecting a union that settles a Title IV case to this type of litigation—the type inherent in the adjudication of common benefit fee claims in the context of Title IV actions—is not only inconsistent with *Trbovich* (and with the congressional policies underlying that decision), but is, in addition, inconsistent with "the effective administration of Title IV," as the Secretary of Labor advised the court below (Br. at 13). The Secretary explained:

> [A]n award of attorneys' fees may preclude expeditious settlement of Title IV cases. The principal motivation for a settlement is the avoidance of litigation. Unions will be less inclined to enter into a voluntary settlement agreement if there is a potential for an award of attorneys' fees. Any disincentive to settlement is serious because of the remedial value of having a new election as soon as possible. The policies of the LMRDA, which include the encouragement of settlements, would be disserved by permitting intervenors to discourage unions from entering into settle-

ments by insisting upon the right to attorneys' fees. [*Id.*] [10]

Because the decision below resolves this important and recurring issue respecting the administration of Title IV in a manner that is inconsistent with the precedents of this Court and that thwarts the "effective administration of Title IV," the Court should grant a writ of certiorari to decide the statutory preclusion issue.

II. The "Common Benefit" Issues

A. On remand, after the court of appeals held that an award of fees was not statutorily precluded, the Magistrate and district court ruled that to prevail under the common benefit exception claimants must prove that "but for" their efforts for which they are seeking attorneys' fees the asserted benefit would not have been realized by those who would be compelled to pay the fees. On that basis, the Magistrate and district court declined to award fees here as they found, as a matter of fact, that the USWA membership would have realized the same asserted benefit had Sadlowski's attorneys done nothing.

The court of appeals rejected the Magistrate's and district court's legal premise, holding that it is sufficient

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[10] This Court has emphasized the importance of settlements to the enforcement of Title IV, stating that one reason Congress gave exclusive enforcement authority to the Secretary was "to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon v. Harvey*, *supra*, 379 U.S. at 140; *see also Wirtz v. Bottle Blowers Ass'n*, *supra*, 389 U.S. at 472 ("the objective [of Title IV] is not a lawsuit" but settlement). Indeed, over 60% of all Title IV cases are resolved by settlement (Mem. on Behalf of the Secretary of Labor at 6 n.3, *Steelworkers v. Sadlowski*, 435 U.S. 977). In contrast to the prompt relief achievable through settlements, in fully litigated Title IV proceedings rerun elections do not occurr, on average, until over 2.5 years have passed. Mallin, *Title IV of the LMRDA—Should Intervening Plaintiffs Be Permitted to Recover Attorney's Fees?* 48 U. Cinn. L. Rev. 345, 355 (1979).

for fee claimants to prove that their activities were of "material assistance" to the Secretary of Labor (App. 9a-10a). In reaching this conclusion, the court of appeals expressed concern that a "but for" standard is too "rigid" (App. 10a), and " 'would impose a burden in the context of Title IV challenges which would be practically impossible to meet and would result in no fee recover[y] by intervenors, thereby emasculating any theoretical right to intervene' " (App. 9a; quoting from respondents' brief).[11] Accordingly, the court below directed a fee award here to respondent Despres for assisting in preparing what Congress intended to be a "layman's complaint" to the union and to the Secretary, *Wirtz v. Laborers Union*, *supra*, 389 U.S. at 482,[12] notwithstanding the finding of the Magistrate and the district court, which the court of appeals did not disturb (App. 12a), "that the assistance of counsel was not in any way necessary to preserve matters for presentation to the Secretary" (App. 76a)—*i.e.*, that the Secretary's ability to institute the suit that eventuated in the rerun election would have been the same had Despres never entered the case.[13]

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[11] This was the identical concern that the court expressed in resolving the statutory preclusion issue (*see* pp. 11-12 *supra*), and, again, in resolving the other common benefit issue in the case (*see* pp. 22-23 *infra*).

[12] *See also Hodgson v. Steelworkers*, *supra*, 403 U.S. at 340-41.

[13] The Magistrate explained:

> We first have the statements of personnel from the Department of Labor supported by decisions of the Supreme Court that the internal union protest procedures are designed to insure that an individual can readily protect his rights. Secondly, there is the testimony of Sadlowski himself that the elements raised in his protest were basically secured without the aid of counsel, and that while it is highly speculative, it would appear that the assistance of counsel would not have been necessary to gather the various elements of the protest. And finally, there are the records of counsel which indicate that little if any time was devoted to assisting his client in prepar-

The court of appeals' reasoning obliterates the distinction between the "common benefit" exception and the "private attorney general" theory repudiated by this Court in *Alyeska*. The common benefit exception, as this Court has explained, permits fee shifting "not because of any 'bad faith' of the defendant, but, rather, because '[t]o allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.'" *Hall v. Cole*, *supra*, 412 U.S. at 5-6, *quoting Mills v. Electric Auto-Lite*, *supra*, 396 U.S. at 392; *see Boeing Co. v. Van Gemert*, 444 U.S. 472, 478. By its terms, this rationale requires proof that the claimants' efforts were a but for cause of the enrichment of those from whom fees are sought. If the asserted beneficiaries would have received the same benefit without the claimants' efforts, then the beneficiaries have not been "enrich[ed] unjustly at the plaintiff's expense."

That proving such a causal relationship may be difficult for an intervenor in a public prosecution provides no warrant for relaxing this standard, as the court of appeals believed. For it is not the office of the common benefit exception to encourage exercise of such rights; its only office is to prevent "unjust enrichment." *Alyeska* holds that it is for Congress—and not for the federal judiciary—to determine when fee awards are necessary to facilitate the exercise of statutory rights:

> Congress has not extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done . . . is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. [421 U.S. at 260]

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ing the protest. From all these elements, it would appear that the assistance of counsel was unnecessary, and that counsel performed little if any service to furthering the Intervenor's protest. [App. 76a-77a]

* * *

> Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. [421 U.S. at 269]

On the issue of the need for proof of causation, the decision below squarely conflicts with the decisions of the Second and Seventh Circuits in *Grace v. Ludwig*, 484 F.2d 1262 (2d Cir. 1978), *cert. denied*, 416 U.S. 904 and *Bender v. Crown*, 551 F.2d 169, 171 (7th Cir. 1977). *Grace* and *Bender* involved common benefit fee claims by private intervenors in an SEC proceeding in which Commission counsel acted as public prosecutor. The courts there held that to recover fees claimants were required to show, as the Second Circuit put it, "that 'but for' the intervention" the benefit would not have been realized. 484 F.2d at 1269. Where that is not shown

> Intervenor must then be characterized as a mere volunteer who aids a public body or trust in the performance of their official duties on behalf of a certain class, but who is not entitled to compensation. [484 F.2d at 1268-69]

The rule adopted in *Grace* and *Bender* is thus precisely the rule rejected by the court below.

B. The decision below finding a "common benefit" conflicts with decisions of this Court and of other courts of appeals in a second respect as well: it authorizes a fee recovery from all of USWA's members throughout the United States and Canada even though, in the court's own view (App. 130a, 132a), Sadlowski himself received a uniquely valuable benefit from this litigation, the 10% of USWA members in District 31 received a less substan-

tial benefit, and the 90% of USWA members outside District 31 received a substantially lesser benefit still.

Because the purpose of the common benefit exception is to prevent unjust enrichment (p. 18, *supra*), a common-benefit award is permissible, as this Court stated in *Alyeska*, only where the "benefits [can] be traced with some accuracy, and there [is] reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." 421 U.S. at 265, n.39. Proper application of the exception requires that it "will . . . operate to spread the costs of litigation proportionately among [the] beneficiaries . . ." (*ibid*). *See also Hall v. Cole*, *supra*, 412 U.S. at 5; *Mills v. Electric Auto Lite*, *supra*, 396 U.S. at 394. The award sought here lacks the indispensible ingredient of a common-benefit award: it would not spread the costs proportionately among those who receive the benefit.

At the threshold, respondent Sadlowski realized a unique benefit from this lawsuit: the office of Director of District 31 (with its $35,000 salary). Indeed, the very reason he was permitted to intervene was because he had a special, personal interest distinct from the interest of the rest of USWA's membership, *Trbovich*, *supra*, 404 *supra*, 412 U.S. at 5; *Mills v. Electric Auto-Lite*, U.S. at 538-539.[14] As a result of the litigation, he received a special benefit that no other union member received.

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[14] *See* App. 91a-92a (White, J., joined by Stewart and Rehnquist, JJ., dissenting from denial of certiorari:

> Intervention was held permissible in *Trbovich* in order to protect a union member's interest, or his choice of how to represent that interest, precisely to the extent that the individual's interest *diverged* from the Secretary's. The Secretary is the champion of the "'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'" Hence, the rationale that provides for the right to intervene in the first place substantially undercuts the intervenor's claim to be creating a significant *common* benefit not already provided by the Secretary. [citations omitted; emphasis in original]

The secondary "beneficiaries" of the settlement of the District 31 litigation were the USWA members within District 31. While the "benefit" they received from the settlement was of an entirely different order than that received by Sadlowski, they at least obtained a new election for director of their district.[15]

Shifting fees only to the District 31 members would be troublesome enough in light of the much greater benefit Sadlowski personally realized. But here a fee award would do far more than that: because USWA districts do not have treasuries of their own, the fee mandated by the court below would be paid from the USWA treasury into which all USWA members in all districts pay dues. As over 90% of the USWA members are in districts outside District 31, over 90% of any fee award would be borne by non-District 31 members. Any benefit to these members from the District 31 settlement is entirely speculative. The Secretary's suit had alleged no misconduct by USWA members outside of District 31. And the settlement merely directed a rerun of the District 31 election; it provided no relief whatsoever outside District 31. Thus any ephemeral benefit the more than 1,000,000 USWA members outside of District 31 may have received from this litigation is, at the very least, of an entirely different order from the political and pecuniary benefit Sadlowski realized from this litigation or even from the less substantial benefit that USWA members within District 31 may have received.[16] This is

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[15] Whether that new election was, in fact, a benefit depends upon whether the original election had been tainted by illegality; if the original election was *not* so tainted, the overturning of that election would not constitute a benefit to District 31 members. The Secretary had, of course, alleged such taint in his complaint; USWA had denied the allegations in its answer; and no adjudication was ever made on the issue. Thus, it is not even clear that the members of USWA within District 31 received a benefit from the settlement.

[16] The court of appeals seemed to believe that the settlement would have educational value outside District 31, teaching would-be-miscreants within the USWA that defective elections will have

not, then, a case in which a fee award would "operate to spread the costs of litigation *proportionately* among the beneficiaries," as *Alyeska* requires.

The court below acknowledged that the "*greatest* benefit was conferred upon Union members in [District 31]" (App. 132a; emphasis in original). That court concluded, however, that this fact could not be allowed to defeat the fee claim, as to do so "would thwart the process of complaint and productive intervention by union members, and deny effect to the policies enunciated by the LMRDA and *Trbovich*" (App. 133a).[17]

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to be rerun (App. 129a-130a). But in reaching this conclusion, the court apparently overlooked that (1) no misdeeds had ever been proven in this case on the part of any person; (2) the Secretary had not even alleged any misdeeds by any person outside of District 31; and (3) there is no apparent reason to believe that the settlement of this case, providing for a rerun election in one district, had any incremental deterrent value beyond the deterrent that arises from the very existence of Title IV and its more than two decades of enforcement by the Secretary. Furthermore, whatever education was provided by the District 31 settlement presumably was not confined to persons within USWA and thus this theory equally would justify—indeed require—that fees be awarded from the treasuries of all unions.

As an alternative theory, the court of appeals suggested that USWA members at large benefited from the rerun of the District 31 election because the director of the district serves on USWA's Executive Board (App. 130a). But as members in other districts have no voice in selecting the director of District 31, a new election can "benefit" them only if it produces a new director who happens to take voting positions on the Board more to their liking. As this is a matter of personal predilection, and not all would likely favor a change, it cannot be the basis for assessing a fee against all.

[17] The court below went on to reason that it was more appropriate for the wrongdoing union to pay the fees than "to penalize the intervenor who performed his function correctly and well" (App. 132a). Never mind that the members of the union might not appreciate a fee being charged to them for an attentuated "benefit" they could not possibly perceive: "If the rank and file is dissatisfied, their recourse lies with the Union leaders who were responsible"

Once again, this is the language, and the logic, of the private attorney general theory, and not of the common benefit exception. The lower court's conclusion can be restated as follows: even though a fee award here would not "operate to spread the costs of litigation proportionately among the beneficiaries," nonetheless fees must be awarded in order not to "thwart" intervention. But *Alyeska* teaches that absent statutory authorization, this is *not* an appropriate basis for a federal court to direct the shifting of fees. As stated in the dissent from the earlier denial of certiorari:

> [t]he lower court's reasoning that a new election in a single district benefited the entire membership of the United Steelworkers of America in such an identifiable and proportionate way as to justify burdening the entire membership with the intervenor's attorney's fees represents logic squarely at issue with *Alyeska's* construction of the common-benefit theory. [App. 92a]

In the wake of *Alyeska*, several courts of appeals have rejected common benefit fee claims in situations in which it was not possible to spread the costs of the litigation proportionately among the acknowledged beneficiaries of the litigation. *E.g.*, *American Association of Marriage and Family Counselors v. Brown*, 593 F.2d 1365 (D.C. Cir. 1979); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981); *Cantwell v. County of San Mateo*, 631 F.2d 631, 639 (9th Cir. 1980); *cf.*, *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir. 1978). In *Brown*, for example, the court affirmed the denial of a fee award because the fee claimant had "obtain[ed] a direct and pecuniary benefit" from the litigation whereas the benefit to the class "is incremental and relatively in-

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(*ibid*). Apart from the fact that there was not even an allegation in the Secretary's complaint—let alone a finding—that "Union leaders" had engaged in any wrong, this reasoning is the antithesis of "common-benefit"—it sounds more of "common detriment": all members should share equally in paying for the union's sins.

tangible." 593 F.2d at 1369. Similarly, in *Adams*, the court denied a fee recovery because, if fees were to be awarded from the fund the claimant had preserved, "it would be impossible to determine which beneficiary bears what costs" and "it is inconceivable that the cost could be distributed in proportion to the benefits received." 657 F.2d at 1123. The decision below squarely conflicts with these decisions.

In sum, the "common-benefit exception has in this case been stretched beyond the bounds of its creative rationale" in ways "affecting the . . . conduct of all common-benefit litigation" (App. 93a) (White, J., dissenting from denial of certiorari). For this reason—as well as to decide the statutory preclusion issue which is "of serious importance to the proper enforcement of the LMRDA" (App. 89a) (White, J.)—the Court should grant a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 402 of the LMRDA, 29 U.S.C. § 482, provides:

(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as

the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401 of this title, or

(2) that the violation of section 401 of this title may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401 of this title, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

Section 403 of the LMRDA, 29 U.S.C. § 483, provides in pertinent part:

* * * * The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

Appendix

81-1906

No. 81-———

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Petitioner

v.

EDWARD SADLOWSKI, JOSEPH F. RAUH, JR.,
LEON DESPRES, KENNETH YABLONSKI,
JUDITH SCHNEIDER,

and

RAYMOND DONOVAN, SECRETARY OF LABOR,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1032

RAY MARSHALL, Secretary of Labor
United States Department of Labor

EDWARD SADLOWSKI,
Intervenor Plaintiff

ANTHONY TOMKO,
Intervenor Plaintiff

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
(District 15) (District 31)

Edward Sadlowski, Intervenor above named, and the following counsel for Sadlowski: Joseph F. Rauh, Jr., Leon Despres, Kenneth J. Yablonski and Judith Schneider,
Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 73-0957—PITTSBURGH)

Argued: September 22, 1981

Before: ALDISERT, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion filed December 16, 1981)

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This case, which stems from a union member's successful challenge to a union election conducted in District 31, in 1973, comes to us on appeal for the second time over the issue of attorney's fees. In *Brennan v. United Steelworkers of America*, 554 F.2d 586 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978) [Appendix E, 94a],[1] we held that an award of attorney's fees was not precluded by Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481 *et seq.* and that the "common benefit" theory was available as a basis for awarding attorney's fees. On remand, the district court was instructed to exercise its discretion on the issue of "[w]hether an award is warranted and, if so, the amount of such award . . . in light of the broader application of the 'common benefit' rationale. . . ." *Brennan*, [136a]. As a guiding principle our court wrote that, "although union members should not be re-

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[1] We recognize that in *Brennan* Judge Aldisert wrote a thoughtful and vigorous dissent. The closeness of the issue there is reflected by the fact that three United States Supreme Court Justices dissented from the denial of the Petition for Writ of Certiorari. Surprisingly, in its brief in support of the Petition for Certiorari, the Department of Labor failed to cite or make reference to Judge Aldisert's dissent. This opinion is not intended to be an intimation that Judge Aldisert has withdrawn from his view that an award of attorney's fees under Title IV of the LMRDA is not statutorily authorized. In his dissent, Judge Aldisert stated:

> In reviewing the accomplishments of appellant's able counsel, I have nothing but the highest praise for the excellence of their services. I quarrel only as to who should pay for those services. I believe that Title IV precludes an award of attorney's fees in this case, and even if it does not, I believe that this is not an appropriate case for an equitable award under the common benefit theory.

Brennan, [150a]. However, the *Brennan* opinion is now the law of this case, and we must ascertain whether the district court's judgment after the remand is consistent with *Brennan*.

quired to pay for unnecessary duplication of legal services, it should not be presumed that mere duplication of effort by either counsel for Sadlowski or counsel for the Department of Labor was unnecessary or non-beneficial."[2] (footnote in original renumbered).

The case was remanded to the district court which assigned the matter to a United States Magistrate for a review of the record and for the taking of additional evidence. The Magistrate's Report and Recommendation, recommended the denial of the fee claim, and was filed on June 7, 1979. The district court adopted the magistrate's findings of fact and recommendation and supplemented the report with additional findings of fact. On October 31, 1980, an Order was entered denying the application for attorneys' fees.

After reviewing the very existence record in this case and after hearing able counsel in oral argument, we have concluded that the district court's denial of fees for work performed by Sadlowski's counsel over the five month period between February, 1973, the date of the first District 31 election and June, 1973, the date of Sadlowski's filing of a complaint with the Secretary of Labor, was error. We will therefore reverse the district court

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[2] The text of the court's footnote 18 is as follows:

> *See* page 598 above. [referring to the court's detailed recitation of the efforts of Sadlowski's counsel] It is clear that some duplication of effort will always occur, since the Secretary must verify information relating to improper union conduct secured and supplied by an intervenor's counsel. Also, time limitations and exhaustion requirements of 29 U.S.C. § 482 and other provisions, may necessitate legal services on behalf of the Secretary as well as such services on behalf of the intervenor. In this case, the decision of the Secretary to terminate the investigation may have justified the continued efforts of counsel for the intervenor to document and preserve evidence of union misconduct. *See* Verified Application for Attorneys' Fees at 103a-104a.

Brennan, [136a] n.18.

insofar as its order denied Sadlowski's counsel attorneys' fees for the above noted five month period and affirm the remainder of the district court's Order.

I.

FACTUAL HISTORY

The factual history of this case has been comprehensively recorded in our earlier *Brennan* decision and in the district court's opinion under review. Consequently, we write here only to summarize those facts.

The United Steelworkers of America held an election on February 13, 1973 in District 31 for the position of District Director. District 31 is the largest in the Steelworkers union, consisting of approximately 300 locals and 130,000 members in Illinois and Indiana. The election campaign, between the union's hand-picked successor to the then retiring District Director of thirty years and Sadlowski, was fiercely fought. During the three-day period it took to count the votes, Sadlowski was advised of widespread ballot fraud, illegal electioneering, deprivation of secret balloting and interference with observers. When the tabulations were complete and Sadlowski's adversary declared the winner by a 1,785 vote margin, Sadlowski hired counsel to investigate the allegations of voting fraud and to aid him in exhausting the internal administrative remedies required by the constitution of the Steelworkers.

Sadlowski filed a protest with the appropriate union authorities who, after reviewing his case, sustained the election result. An appeal was taken to the International Executive Board which likewise denied Sadlowski's challenge. Having exhausted his union remedies, Sadlowski filed a timely complaint under the LMRDA with the Secretary of Labor.

The Secretary investigated the complaint and on November 8, 1973 filed a civil suit in the Western District

of Pennsylvania seeking to void the District 31 election. The district court granted Sadlowski's motion to intervene as a plaintiff. Following extensive pretrial negotiations, in which Sadlowski's counsel played a role, a settlement was reached calling for a new election in District 31. The district court approved the settlement and a new election was held on November 19, 1974. Sadlowski handily defeated his opponent, who had been serving as Director since the initial election in February, 1973, by a 19,479 vote margin. This result was finalized on December 2, 1974 and Sadlowski assumed the post of District Director.

II.

CLAIMANTS' VERIFIED APPLICATION FOR ATTORNEYS' FEES AND FIRST APPEAL

Sadlowski's counsel submitted a Verified Application for Attorneys' Fees with a supporting memorandum to the district court on January 31, 1975. The application detailed the work of four attorneys, Leon Despres, Joseph Rauh, Jr., Kenneth J. Yablonski and Judith Schneider on behalf of Sadlowski. It sought attorneys' fees for work performed prior to the Secretary's filing of a complaint and for "post-complaint efforts to expedite, conduct discovery and bring about a fair rerun settlement, [and] . . . to facilitate a fair election itself." Brief for Appellants at 6.

In *Brennan*, we detailed in three full pages the work allegedly performed by Sadlowski's counsel both pre- and post-complaint. We emphasized the critical nature of private participation in the enforcement scheme of Title IV and at numerous points indicated, either explicitly or implicitly that Sadlowski's "need for counsel cannot be doubted." *Brennan*, [108a].

The test for an award of attorney's fees is whether counsel's work was a material assistance to the Secretary and ultimately contributed to a result which can be

said to be for the common benefit of all union members. The "common benefit" theory, in turn, entails satisfying three elements: whether the benefits may be traced with some accuracy; whether the class of beneficiaries are readily identifiable; and, whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefitting. Id. at [128a]. The attorneys for Sadlowski contend that the work they performed on behalf of their client was a material assistance to the Secretary and qualified under each element of the "common benefit" theory. Specifically, they argued before the district court and here on appeal that "the vindication of union democracy [in securing a rerun election] . . . is a substantial common benefit conferred on the union and its members. . . ." Brief for Appellant at 8. Sadlowski's successful challenge served notice on the union and its members that election improprieties would not go unchallenged.

III.

THE MAGISTRATE'S AND THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

The magistrate, to whom the case was assigned after remand, reviewed the application for attorneys' fees and recommended that the application be denied. It is clear from reading the magistrate's report that the standard applied was whether the assistance of counsel was strictly necessary to perfect a protest through the union's internal procedures and then to the Secretary of Labor.

When considering the work performed by counsel in marshalling the facts and phrasing the issues for presentation to the Secretary, for example, the magistrate wrote, "it was the opinion of Stephen Ernst, who was the lead litigation and trial counsel for the Department of Labor in this suit, that Sadlowski's counsel aided Sadlowski in perserving his rights. . . ." Nevertheless,

because "no showing has been made that the assistance of counsel was necessary to preserve these interests," the work was adjudged by the magistrate to be uncompensaable.

Similarly, the district court by adopting the magistrate's report seemed to require that the assistance of counsel be necessary. The district court went even further when it considered the overall benefit of Sadlowski's successful protest, writing that:

> Who desired the benefits from the settlement? Well, certainly Sadlowski did in spite of the fact that his counsel opposed it, because there was a new election in which he won the victory which he had sought originally. The circumstances do not matter as to whether they were hotly contested or not at this time. He, Sadlowski, was victorious. Undoubtedly, he benefitted. And since he was campaigning through his counsel all the way through the continuance of the processing of this action, as was shown to be the case by the evidence produced as a whole, it was Sadlowski's counsel's campaign activities which eventually became victorious.
>
> As for any benefits which might be considered to be "common" to the other Districts, there are only fanciful assertions that all the 1,400,000 International members of the Union will be put on notice that election improprieties will not be tolerated—as if all 1,400,000 such members really were in need of such notice; and further, that the election of Sadlowski would "willy-nilly" have been to the common benefit of the 1,400,000 members—if that benefit was in fact needed, or even that the intervenor's election might not actually have been detrimental to any of all these International members.
>
> What is uncontravertedly obvious to me as a fact-finder is that there is no evidence whatsoever that

any District including District 31 was affected. If there had been any common benefit to the International or any other District, that evidence should have been presented in the case to make it manifest in order to base a judicial determination entitling the claimants to fees. Otherwise, the claimants required me as a factfinding judge to assume that their argument was a fact and not just a conclusion that the 1,400,000 International membership was commonly benefitted, and more so that the assumed common benefit was a reasonable basis for shifting the costs of the intervenor's campaign to the 1,400,000 International membership with "some precision to those benefitting." But there is no such factual persuasion of precision benefitting. Neither was there any factual persuasion of precision benefitting 126,000 members in District 31, because the claimants' activities were directed in the irrelevant financial path for procuring inadmissible evidence politically beneficial only to Sadlowski's potential, eventual election. Even here if such character of irregularities required notice to the membership, there is no evidence of that.

* * * *

I find it impossible to extract from the evidence in this case as a whole any "substantial benefit on the members of an ascertainable class" bestowed by the claimants. Even with the election of Sadlowski as Director, there is no evidence of whether the District 31 membership were better or worse off with Sadlowski as Director.

District Court Opinion, App. Vol. V at 01587-89 and 01590. Consequently, the district court awarded no attorneys' fees.

IV.

THE PRESENT APPEAL

In *Brennan*, we instructed the district court to exercise its discretion in deciding whether the work performed by Sadlowski's counsel was for the common benefit of the rank and file members of District 31 and the Steelworkers in general. It exercised that discretion, and we are now asked to review the order of the district court denying attorneys' fees. We note that our standard of review is twofold. When reviewing the magistrate's and the district court's use of a strictly necessary standard to gauge whether counsel should be awarded fees, we will treat this holding as a conclusion of law and exercise plenary review. When considering the findings of fact as found below, we will use the clearly erroneous standard.

The appellants contend that the use of the strictly necessary standard is tantamount to applying a "but for" standard. They argue that

> [t]o require, as the District Court would require, intervenor to prove that without his participation the Secretary would not have secured a rerun election is inconsistent with this Court's *Sadlowski I* [*Brennan*] decision; such a standard would impose a burden in the context of Title IV challenges which would be practically impossible to meet and would result in no fee recovering by intervenors, thereby emasculating any theoretical right to intervene."

Brief for Appellants at 19. We agree with the appellants that a strictly necessary or "but for" standard is inconsistent with *Brennan*.

In *Brennan* we quoted with approval the following language from *Usery v. Local Union 639, International Brotherhood of Teamsters*, 543 F.2d 369, 384 (D.C.Cir. 1976), *cert. denied sub nom., Local Union No. 639 v. Marshall*, 429 U.S. 1123 (1977):

> "It is not difficult to conceive of examples of material assistance to the Secretary and the court in vindication of the interest—of the public and the union rank and file—in union democracy . . . [C]ounsel representing the intervenor may unearth material and even elusive evidence, or develop telling arguments in support of the Secretary's claims of illegality. . . . [T]he *Trbovich* court envisioned that intervenors would perform a role independent of the Secretary in helping the court fashion a suitable remedial order, and perhaps even assist the Secretary in supervising the conduct of the rerun. . . . [S]ound principle advises that error is more likely to be exposed when intervenors are able to secure competent counsel because of the prospect of recovering attorney's fees." [Footnotes omitted.]

Brennan, [107a]. We have concluded that the district court erred by applying a more rigid standard than that indicated by our decision in *Brennan*. Further, the magistrate's constant concern over whether the presence of counsel added anything to what Sadlowski could have done alone is in stark contrast to our admonition in *Brennan* that:

> The agency and the intervenor perform truly different roles, with, in our view, considerably less overlap and waste than the district court found. The Department of Labor performs a quasi-judicial, rather than a purely adversarial role in Title IV cases. Its duty is to the public, its own policies, the union interest, and the individual. In deciding whether to institute suit, what to complain of, and what to settle for, the Secretary must constantly weigh competing interests and duties. . . . Considering the complexities of internal union remedies, complaint to the Secretary, and recourse to the courts, and the penalties for lack of legal or technical sophistication, we cannot believe that intervenors were intended to proceed *pro se*.

[115a-116a]. With the above principles of *Brennan* in mind, we will now proceed to review the appellants efforts under the "common benefit" theory and the district court's holdings.

A. *EXHAUSTION OF UNION REMEDIES*

As already noted the District 31 election took place on February 13, 1973. The returns were not complete until February 16. On the sixteenth, Sadlowski called Despres seeking his assistance in filing a protest with the union. Despres agreed to represent Sadlowski on February 17 and began working to gather information and evidence concerning election irregularities. The union's constitution required a protest to be filed with the International Tellers not later than 10 days after the election. Thus, Despres had only seven days from the time the election results were announced to file a protest in an election involving 300 locals and 130,000 members.

During the seven-day period, Despres alleges that he conducted the following activities:

> Despres examined the union constitution and procedures, examined the applicable legal authorities, advised Sadlowski on the legal necessity to exhaust union procedures, interviewed Sadlowski, interviewed witnesses, advised Sadlowski associates who were interviewing witnesses, prepared statements and affidavits, gathered documents, put data in presentable form, prepared a draft of a protest of the election, conferred with Sadlowski and associates and revised the draft and conferred with Sadlowski about the protest generally and his conduct in relation to it.

Verified Application for Attorneys' Fees at 4. Despres continued to assist Sadlowski with his case as it proceeded through the Steelworkers' internal review and appeal procedures. This process was not completed until

May 31, 1973, when the International Executive Board, chaired by Steelworkers' President Abel, denied Sadlowski's appeal and ended his recourse through the union's internal procedures.

The magistrate's and the district court's opinion of Despres' work during this time period can be seen in the district court's summarization and adoption of the magistrate's findings. The trial court found that:

> 1. In order to preserve issues for presentation to the Secretary, only minimal requirements are imposed; that these obligations could readily be fulfilled without the assistance of counsel; and that the assistance of counsel was not necessary to preserve matters for presentation to the Secretary.

[Appendix B, 12a]. We have already concluded that the district court applied the wrong standard for judging whether counsel should be granted fees. The LMRDA requires that the union member exhaust internal remedies before the Secretary can file suit, 29 U.S.C § 482(a), and the Supreme Court has limited the Secretary's power to issues raised by the claimant. *Hodgson v. Local Union 6799, USWA*, 403 U.S. 333 (1971). We now conclude that Despres' efforts from February 16 until the date of the final International Executive Board decision on May 13 are compensable if they were ultimately for the Steelworkers' "common benefit."

The "common benefit" to the Steelworkers of Despres' efforts on behalf of Sadlowski are clear. Without processing the protest through the Steelworkers internal remedies, Sadlowski would have been foreclosed from going to the Department of Labor. While it may be true that an attorney's assistance was not absolutely necessary, as we wrote in *Brennan*:

> quick action and skillful advocacy are probably most important at the initial stages of the enforcement scheme, when infractions must be identified, a bill

> of particulars formulated, the internal union procedures exhausted, and a complaint drafted for presentation to the Secretary. Prompt, thorough, and proper action in the earliest stages is essential to vindication of Title IV rights, since preservation of all election defects is a prerequisite to government intervention.

[106a]. Absent Sadlowski's quick challenge to the election and Despres' legal assistance the Steelworkers would have been deprived of the candidate of their choice. We have no difficulty in concluding that all Steelworkers, but especially those in District 31, benefitted from the ultimate vindication of union democracy.

B. *THE COMPLAINT FILED WITH THE SECRETARY OF LABOR*

On June 25, 1973 Sadlowski filed a complaint with the Department of Labor totalling nearly 100 pages. Aided by the assistance of counsel, the complaint was specific, detailed and accompanied by supporting documentation. The chief trial attorney for the Department of Labor stated in an affidavit that Sadlowski's counsel had performed a valuable service both to his client and to the Department. Further, the compliance officer in charge of the investigation candidly conceded in a deposition that of the 64 locals investigated by his team 59 were selected on the basis of Sadlowski's complaint.

Again, as with the exhaustion of remedies work, the district court dismissed the efforts of Sadlowski's counsel "as not necessary to invest the Department with jurisdiction to inevstigate and ultimately to sue." We think that it was error not to consider the material assistance provided by counsel for Sadlowski. We have also concluded that Despres' efforts were a common benefit to the Steelworkers and a material assistance to the Department of Labor. Sadlowski's and Despres' efforts narrowed the issues for Labor and helped to isolate the specific problems with the election.

C. *LABOR'S DECISION TO BRING SUIT*

After Sadlowski's complaint to Labor was filed on June 25, 1973, and after Labor completed its investigation in August, the district court granted Labor three extensions of its statutory deadline for deciding whether or not to initiate suit.[8] Sadlowski and Despres became concerned that union lobbying with the Department would result in no law suit being brought even though the investigation by Labor confirmed Sadlowski's allegations of election improprieties. Thus, they engaged Joseph L. Rauh, Jr., a prominent Washington, D.C. attorney experienced in LMRDA election proceedings, to carry their case forward within the Department.

Sadlowski's counsel, Despres and Rauh, argue that the Department of Labor performs a quasi-judicial role in Title IV cases and that Rauh's efforts in Washington were a necessary counter-balance to the adversarial posture taken by the union's lawyers. William J. Kilberg, then Solicitor for the Department of Labor, stated in an affidavit that after Labor's investigation the decision to sue was a foregone conclusion absent an agreeable settlement. The district court found that Kilberg's statement was representative of Labor's position and that the extensions granted to Labor "were for the purpose of allowing USW to investigate the election." [Appendix B, 50a].

While we are inclined to disagree with the district court on the role of Rauh in moving the Department of Labor to action, we cannot say that the findings of fact on this issue are clearly erroneous. We will therefore affirm the district court's denial of attorneys' fees for work performed in an effort to urge Labor to file suit in district court.

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[8] Section 482(b) gives the Secretary 60 days from the filing of a complaint to institute a civil suit in district court if he or she finds probable cause to believe that an unremedied violation exists. 29 U.S.C. § 482(b).

D. *SADLOWSKI'S INTERVENTION FROM FILING OF SUIT BY LABOR THROUGH THE SETTLEMENT PROCESS AND RERUN ELECTION*

The Secretary of Labor instituted suit in the United States District Court for the Western District of Pennsylvania on November 8, 1973. On January 17, 1974, Sadlowski was granted leave to intervene. Local counsel was engaged in the person of Kenneth J. Yablonski and a fourth attorney, Judith Schneider, was hired to complete Sadlowski's legal team.

The gist of counsels' argument is that they took depositions, participated actively in settlement conferences by critiqueing proposed settlements and by making independent suggestions, and assisted in ensuring that the agreed upon rerun election was fair. We have no doubt that counsel worked very diligently throughout this entire period. However, we cannot say the district court's findings that counsels' work was either duplicative of the Secretary's or was rejected by the court are clearly erroneous. Furthermore, the work performed by counsel, although substantial, was at this stage of the process more for the benefit of a specific candidate, Sadlowski, than for the common benefit.[4] Thus, we will affirm the district court's denial of attorneys' fees for work performed during this period.

V.

THE COMMON BENEFIT

The common benefit from Sadlowski's drive to overturn a union election characterized by fraud is without doubt. The district court's finding that a new election,

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[4] Sadlowski later became a candidate for another union office seeking the post of International President in February, 1977. He lost this election to the union's officially endorsed candidate by a margin of 79,580 votes. *See* Sadlowski v. Marshall, 464 F.Supp. 858 (D.D.C.) (rejecting Sadlowski's challenge to the Department of Labor's refusal to bring suit to challenge the election), *aff'd mem.*, No. 79-1461 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

which ultimately produced a victory for Sadlowski, did not benefit the union members in general runs counter to the decisions of the Supreme Court and other circuits, to the clear principles of *Brennan* and to common sense. The district court by asking, "who desired the benefits from the settlement?" and then answering Sadlowski misconstrued the nature of the common benefit theory.

In *Hall v. Cole*, 412 U.S. 1, 8 (1973), the Supreme Court noted that an individual, by vindicating his own right to free speech under Title I of the LMRDA, "dispels the 'chill' cast upon the rights of others." *Brennan*, [129a]. That the individual who brought suit also receives a direct personal benefit from it is of no matter when considering the " 'implications for the future conduct of the union's affairs.' " *Hall*, 412 U.S. at 8 *quoting Yablonski v. United Mine Workers of America*, 466 F.2d 424, 431 (D.C.Cir. 1972), *cert. denied*, 412 U.S. 918 (1973). The common benefit from dispelling a chill on free speech is exactly parallel to the common benefit Sadlowski conferred on the Steelworkers by insisting on a fair election.

More recently in *Usery v. Local Union No. 639*, 543 F.2d 369 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977), the District of Columbia Circuit considered the same attorney's fees issues in a Title IV challenge to a Teamsters' local election as our court did in *Brennan*. The Court noted that the LMRDA was passed by Congress in 1959 "[i]n response to findings of extensive corruption and improper fiscal and electoral practices by labor unions . . . ." *Local Union No. 639* at 373. The Court examined the many common benefit cases under various titles of the LMRDA and concluded that, "the governing rationale was that union members by bringing suits against their union help vindicate the statutory policy in favor of union democracy which necessarily re-

dounds to the benefit of the entire membership." *Id.* at 383. On remand, the district court awarded $35,000 in attorney's fees in part because "counsel vindicated important rights of Union members, *i.e.*, the right to free and fair union elections and administration, and that they succeeded in establishing significant new principles of law . . . ." *Marshall v. Local Union No. 639*, Civil Action No. 1963-72 (D.C.C., Order of August 4, 1977) *reprinted in* App. C to Appellant's Brief at A. 10.

We have thus concluded that Sadlowski's counsel played a vital role in the statutory enforcement scheme of Title IV. Through the efforts of Despres, evidence was preserved and marshaled and a persuasive case was presented to the Secretary. The ultimate result of this work was a rerun election that Sadlowski won. This was more than a "fanciful assertion" of benefit and redounded to the common good of all steelworkers. Thus, it should be compensated accordingly. *See Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973); and, *Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (*en banc*).

VI.

CONCLUSION

The order of the district court denying counsel attorney's fees for work performed in exhausting the union's internal procedures for challenging the election and in filing a complaint with the Secretary of Labor will be reversed. The district court's order will be affirmed insofar as it denied attorneys' fees for the period after the Secretary received the complaint and decided to institute the lawsuit which led to a settlement. We will therefore remand this case to the district court for a determination of the amount of attorney's fees to be awarded in

accordance with this opinion and the opinions of our circuit pertaining to the fixing of fees.[5]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[5] Plaintiffs have requested that any remand be to a different judge and magistrate than the ones who have heard this case since its inception. While we will not rule that the case should be assigned to another district judge, we do suggest that whoever presides over this matter on remand, act expeditiously and hopefully not with excessive frugality. Counsel should not be penalized for winning an appeal with legal and factual arguments contrary to the district court's position or because someone might perceive counsel's style as abrasive. Counsel should always be compensated for the quality of their work and not on the trial judge's evaluation of counsel's affability. We are confident that on remand the district court will act expeditiously to award a proper fee based on the record before it that already adequately demonstrates the energies of counsel during the appropriate period.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. 73-957

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff

v.

UNITED STATES OF AMERICA,
AFL-CIO-CLC (District 31),
Defendant

EDWARD SADLOWSKI,
Intervenor

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor
EDWARD SADLOWSKI,
Intervenor plf

ANTHONY TOMKO
Intervenor plf

v.

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC (District 15) (District 31)

Edward Sadlowski, intervenor above named and the following counsel for Sadlowski: Joseph L. Rauh, Jr.; Leon Despres; Kenneth J. Yablonski; and Judith Schneider

OPINION

ROSENBERG, DISTRICT JUDGE

This matter is before me now and on remand from the Court of Appeals on the claims of four attorneys for the Intervenor, but none by the Intervenor, himself. I is here now for the determination of a factual issue as that determination is either supported or not by a

preponderance of the evidence in the case. That issue is whether such evidence supports an award of counsel fees to an intervenor's attorneys on an equitable basis on the "common benefit" theory. *Brennan v. United Steelworkers of America*, [94a].

Rather, the issue is broadened to the extent that this court must, should or can determine from the evidence adduced by these attorneys whether their aggregate contribution of service brought about a common benefit to the defendant's total membership of what, if any, service was rendered by the three attorney-claimants and one legal assistant, and the proportion of contribution each may have made for entitlement to each one's claim (since each made separate claims) in achieving a successful outcome for the plaintiff—as such commonly benefitted the total membership of the defendant. If indeed each did make a material contribution in his or her way as attorneys for the successful outcome of this action, it is obvious from the evidence produced that the four did not act in unison or act commonly for an aggregate fee, but that each would be entitled to an amount for services so rendered and that each would require individual evidence to support the individual entitlement.

This action was brought originally by Peter J. Brennan, Secretary of Labor (Secretary), against the United Steelworkers of America, AFL-CIO-CLC, Districts 31 and 15 (International).[1] Anthony Tomko, the defeated candidate in District 15 and Edward Sadlowski, the defeated candidate in District 31 were eventially permitted to intervene. However, after the plaintiff and defendant requested me to sign an order of court settling the case by ordering a new election in District 31, the intervenor objected to the settlement for pointless reasons and I ordered the settlement. Application for counsel fees for the four intervenor's attorneys followed. I denied this for

[1] The caption of the case was amended to name the successor plaintiff, Ray Marshall, Secretary of Labor.

lack of statutory authority. On appeal, Judge Van Dusen in an opinion for the court determined that the intervenor's attorneys would not be precluded from recovering counsel fees under Title IV of the Labor Management-Reporting and Disclosure Act under the broader application of the "common benefit" rationale; and if so allowed, the amount of such an award would be a required determination. These two questions, only, were returned for my consideration. Being bound by the law of the Court of Appeals, I proceed to inquire into and adjudicate those two questions by a preponderance of all the evidence in the case.

Of course, I disregard two principles expounded first by Judge Aldisert in his dissenting opinion in *Brennan v. Steelworkers of America*, [146a], and second in Mr. Justice White's dissent in *Brennan v. United Steelworkers*, 435 U.S. 977, 979 (1978), [Appendix D, 89a, 91a]. The principle expounded by Judge Aldisert in his dissenting opinion is disagreement with the proposition "that the consensual agreement to a new election for District Director in Illinois and Indiana conferred a common benefit upon the entire membership of the United Steelworkers of America". The dissenting opinion of Mr. Justice White is to the effect that it would have been improper for an intervenor to interfere (if he did) with the Secretary of Labor's discretionary and exclusive enforcement authority in this area, since "the rationale permitting intervention was not to duplicate the efforts of the Secretary", and further that the exception to the traditional American rule against awarding attorneys' fees on the common benefit theory premised on a court's equity power should not be expanded.

I assigned the original inquiry to United States Magistrate Robert C. Mitchell who broadened the parties' prerogatives to present all the evidence they desired. Thereupon all the parties did provide the magistrate with a large volume of depositions and affidavits, and he per-

sonally presided over a large part of the case. From all these the magistrate made findings of fact, conclusions of law and a report and recommendation disallowing the attorneys' fees to the claimants because of a lack of foundation in the evidence to support the wide variety of assertions made by them.

After a lengthy and carefully scrutinized examination of this report and the record made by the parties, I confirm the findings of fact of the magistrate and adopt his recommendation as my findings of fact. But I do not act on this alone. I here set forth additional findings of fact as I supplement the magistrate's report and findings and as I, the presiding judge, have found them to be factual from the evidence and the proceedings in this case before me personally.

As I have already stated, this issue was originally presented to me by an application for attorneys' fees immediately after I signed the order for a settlement. Other than the pleadings, originally, there was no proof presented nor was any request made for a formal hearing or for the privilege of presenting any proof to me of entitlement to attorneys' fees. The total amount demanded seemed exaggerated in view of the knowledge which I had of the case. No evidence or law was presented to me to convince me of any legal entitlement. This last statement explains that the Court of Appeals as well did not have any evidence before it to support any legal entitlement to fees by the claimants, but was required to base its determination of law upon what the claimants only asserted to be facts without the necessary proof which should have been given to me.

As the Court of Appeals said:

> "We emphasize that we are not passing on the truth of the statements in the record or on the character of the intervening plaintiffs, as opposed to that of the high-ranking officers of the union, but we are re-

> quired, under the posture of the case as it existed at the time of the district court order from which the appeal was taken, to take all well-pleaded allegations in the record as true for purposes of this appeal and to construe them in the light most favorable to the plaintiffs." [96a]

The pleading raising the issue of fee entitlement was identified as "Verified Application For Attorneys' Fees", and was filed not by the intervenor himself but by three lawyers and one law assistant who assert that they acted in behalf of the intervenor. The inquiry before me, therefore, is towards payment or non-payment of fees to the claimants who, assertedly, had been the intervenor's lawyers in the case before me.

The Court of Appeals, on return to me, provided me with the following:

> "Whether on award is warranted and, if so, the amount of such award, is a matter for initial determination by the district court in the light of the broader application of the 'common benefit' rationale . . ." [136a].

Based upon the directive of the Court of Appeals, the claimants were given additional opportunities to present evidence to support their respective contentions and to present sufficient evidence of persuasiveness and the defendant also was given similar opportunities to present evidence if it could contrary-wise so that from receipt of the evidence of both parties this court might have sufficient evidence, pro and con, for a determination legally by the preponderance of all of the evidence in the case of whether an award was or was not warranted as now based upon the common benefit rationale in accordance with the guidelines of the Court of Appeals. This, it will be noted, differs from that in the case originally when the question before me was on the theory of whether attorneys' fees were awardable generally as a matter of

law in Title IV of the Labor Management-Reporting and Disclosure Act of 1959. And so at the time neither the claimants nor parties plaintiff and defendant believed it necessary to present such evidence, pro and con, as is now before me for a judicious determination.

HISTORY AND FINDINGS

An overall election was held on November 13, 1973 by the defendant, United Steelworkers of America, for the election of directors in its 35 geographically divided, nationwide Districts, encompassing a total membership of 1,400,000 members. After the election, 6 complaints out of 35 Districts came to the Secretary of election irregularities. Then after these six complaints were investigated, the Secretary concluded that only two merited action which was filed in this court. These were, from his findings, District 15 where the defeated candidated, Anthony Tomko, and District 31 where the defeated candidate, Edward Sadlowski, filed complaints. The Department of Labor brought this action on its own accumulated evidence for the procurement of a satisfactory resolution in these two Districts.[2]

Both Sadlowski in District 31 and Tomko in District 15 asked to intervene. The complaint was separated by this court into "A" and "B" parts for Districts 15 and 31. From that point my concern and attention in this determination is to the procedures and the circumstances in District 31 as they bear any significance to the merit or the lack of merit to the intervenor's claimants' claim for attorneys' fees, except in those instances where explanatorily related factual references will be pointedly made to District 15.

As I stated before, in order to give the claims the fullest consideration, I first referred the matter to a United

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[2] The settlement in each District was different. In District 15, it was the adoption of a new set of nomination procedures. In District 31, both parties agreed to a supervised re-run election.

States Magistrate for a detailed inquiry. His report is elaborate, searching and pointed. Objections were filed to his report by the claimants and by the defendant in its "Response to Objections of Intervenor". I have examined and re-examined the record carefully and I am now in a position to arrive at the following factual findings from the total record in the case, the magistrate's report, and from my own knowledge judicially acquired while presiding in the case.

The members of District 31 who might have benefitted, if any benefit arose from the action of the claimants, comprise 1/10th of the membership of the United Steelworkers upon whose 1,400,000 members nationally would fall the obligation to pay the claimants' bill under the common benefit theory. Accordingly, as the presiding judge, I must be judicially satisfied that the claimants' claims are justified, reasonably earned, fair and of benefit to the total union's membership, as a matter of equity, before I can in good conscience place this liability upon the defendant's more than one million men and women upon whose wages such liability would likely attach, before they are entitled to receive them. District 31 which covers a geographic area including parts of northwestern Illinois and northwestern Indiana comprises a membership of approximately 126,000.

While it is incumbent upon me to hear evidence and award any fairly earned attorneys' fees, it was not at the beginning when the fee application was first filed, incumbent upon me to seek out the claimants and demand that they produce evidence—whether they wanted to or not—or whether they could not; however, no pleading or indication came from them demonstrating or even indicating any readiness to proceed to satisfy me of their entitlement to any sums of money, since they argued only their legal rights to fees. Accordingly, based upon only the contents of the filed petition, I was not prepared to make any firm determination of entitlement or to adjudicate quantitative entitlement upon any conclusionary

summaries of activities and amounts as averred in the petition. Particularly, I was not so inclined when many of the averments in the petition were contrary to the facts in the case as I knew them to be as the presiding judge. Some of these I shall presently point out.

Immediately, or soon after the complaints of election irregularities were received, the Secretary assigned a large number of experienced Department of Labor (DOL) Compliance Officers, all under the direction of supervisors to investigate the 6 election complaints. The investigators had frequent consultations with the defeated candidates and hundreds of others. I accept the affidavit of Stephen Ernst, Chief Trial Counsel for the Secretary of Labor, who made factual averments and to which no counter-affidavit was filed; and now incorporate these as some of the findings of fact in this case, particularly as these relate to District 31. However, insofar as the activity of the Secretary is concerned, I shall indicate only that much as may have been inter-related in the continuing inquiry into the complaints, their processing and terminations in all six Districts from which reports of irregularities came to the Secretary, sufficient to induce the Secretary to procure overall evidence.

As far as District 31 is concerned,

(1) The Secretary had assigned 19 DOL Compliance Officers to the investigation of this District, and over 3,600 person hours were expended by them in the process;

(2) Chief Trial Counsel, Stephen Ernst, accumulated "several file drawers of materials" in his office and additional boxes of materials in the Chicago office of the Secretary of Labor (Ernst Affidavit II, paragraph 5); and

(3) The evidence so adduced by these DOL investigators and the Secretary's counsel was more than sufficient for the Secretary to pursue the action in District 31 (again without regard to the other five districts) where the evidence was so abundant as to make it feasible to

proceed to trial without formal discovery, except for such as the defendant may have desired.

Counsel for the Secretary had accumulated by these investigations more than enough evidence to enter this action and to carry it to completion without aid from the intervenor or any of the claimants. The reason for this was that counsel for the Secretary had on the working staff highly motivated and skilled professional federal investigators upon whom complete knowledgeable reliance could be placed. However, that would not have prevented the Secretary from participating in any discovery which would be initiated by the defendant International. In fact the defendant had indicated to me, as I presently explain, the desire to depose a large number of members in the Chicago area. This was defense evidence, not plaintiff's evidence.

The activity of the Secretary and his staff of 19 DOL Compliance Officers was of such magnitude that one of the claimants' attorneys for the intervenor, Leon Despres, wrote to another claimant attorney, Joseph Rauh, on August 30, 1973 and admitted that the Secretary had accomplished comprehensive and conclusive results from the DOL investigation.[3]

While the Compliance Officers interrogated the two unsuccessful candidates, there is no evidence that the Secretary consulted with Sadlowski or his counsel on whether or not to commence any action in the United States District Court for the Western District of Pennsylvania, or in any other court. So thorough had been the work and so voluminous the results of the Secretary's staff that the Secretary was able to proceed with the

[3] This letter of Despres and another letter addressed to Rauh was evidently for the purpose of obtaining "encouragement or information that might help Sadlowski in the Campaign" and praised the Secretary and his staff for the intensive investigation which the Secretary had carried on and stated that "[a] new election seems likely" to occur for Sadlowski's benefit.

entry of this action and pursue it. As I just stated, this did not include the depositions which the defendant desired from a large number of voters in Election District 31. In fact, counsel for the plaintiff and defendant indicated their desire for this court to sit in Chicago for a week, more or less, to supervise the taking of such depositions.

The fact that on three or four occasions either Sadlowski or his attorney, Mr. Rauh, called the Secretary obviously had no effect upon the Secretary's determination to file suit, is corroborated by the affidavit of William J. Kilberg, Solicitor for the Department of Labor, who had final authority on the decision to sue. This was presented before the magistrate and was not contradicted by any counter-affidavit. He testified that:

> "It is clear that at no point in time, once the field investigation had been completed in early August, was there ever any doubt that short of a satisfactory settlement, the Department would sue in District 31." (Kilberg's Affidavit, paragraph 9).
>
> "I know, from my own knowledge, that nothing done by Mr. Rauh or any other attorney for Mr. Sadlowski contributed to the Department's decision to institute suit in District 31. That suit would have been instituted on the date it was instituted, whether or not Mr. Sadlowski had been represented by attorneys." (Kilberg's Affidavit, paragraph 29).

Since neither the Secretary nor any member of his staff who functioned for the Secretary in his procedure had reason to have personal interest in this matter, nor in the constant flow of such labor cases coming for their attention and processing, I give high credibility and great weight to their testimony. This is more so true because of the many conflicting assertions made by Sadlowski's supporters, particularly as I know the facts in the case which came before me in open court.

All in all, I endeavored to detailedly scrutinize the voluminous summary recitals presented in affidavit form to the magistrate by the claimants as these were presented with a changed attitude in derrogation of practically all which the Secretary of Labor, his counsel and the large number of DOL investigators had done. Previously, counsel lauded the Secretary's DOL officers' activities. Had the claimants' Narrative given some fair evaluation to the Secretary and his staff, as counsel had done in their previous letters, and been less self-laudatory, they might have been more credible as to such matters which they averred as being out of court.

As to their recital of boasts of their in-court activities and their specific influence on this court in securing an ultimate settlement[4] and decree for a new election, I not only reject these in-court statements, but as well I find many of their out-of-court statements contradicted or unsupported by the evidence. Thus, the claimants' proof is insubstantial and insufficient and lacking persuasiveness enough for me to hold their contentions (and claims) proven by a preponderance of the evidence in the case as a whole. I make this conclusion as the presiding judge who had a more impartial knowledge of the in-court facts involved than any other person in the case.

The Secretary of Labor through its official counsel filed this action on November 8, 1973.

Soon after that Edward Sadlowski, the defeated candidate in District 31, filed for leave to intervene. On January 21, 1974, the plaintiff and defendant stipulated to separate the trial relating to Districts 15 and 31 and designated them as District 15, Part "A" and District 31, Part "B." The plaintiff accordingly filed a complaint in

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[4] During my in-court hearings and arguments, some time was shared in discussing settlement with the plaintiff's and defendant's counsel, and they informed me that the Secretary's aim from the beginning was to arrive at a settlement by having the defendant agree to a new election. Evidence in the case supports the plaintiff and defendant counsel's statements of settlement aims. This settlement the Secretary's and defendant's counsel eventually achieved.

each of these separately in order to identify the facts which he alleged to be pertinent to each of these Districts. These amended complaints were filed January 28th.

On February 12th, the defendant filed answers to the amended complaints as related to these two Districts.

The matter came before me in open court for the first time on the motion of the plaintiff to expedite the trial of both Parts A and B.

The second open-court matter before me came when the plaintiff requested a preliminary injunction and clarification of the pretrial order. The intervenor's counsel was also present, but was more an observer than a participant. On this occasion in court, counsel for both the plaintiff and defendant attempted to have me make a determination on the admissibility of evidence which had been presented in a previous labor case and explained that it would simplify this case. I denied the motion as being premature and informed counsel I would require facts in evidence before I could make a determination on the admissibility of any evidence, especially such as was not yet before me.

The next activity occurred when both plaintiff's and defendant's counsel desired someone to preside over the taking of depositions (presumably desired by the defendant) of a large number of witnesses in District 31 in Chicago, asserting that the taking of such depositions would be helped by the court's supervision. This would have required at least one week's time. I held the matter in abeyance and informed counsel that consideration would be given to this at a future, appropriate time. The intervenor's counsel was of no significant help here to the plaintiff.

In the meantime, I urged counsel for the plaintiff and defendant to continue their attempt (as I had previously stated) to reach a settlement in the case, since this would

save the work of the court in Chicago and the many months which counsel indicated would be necessary for the trial. Counsel for the plaintiff and defendant agreed with me and informed me that they were interested in a settlement and agreed with me that a lengthy trial was unwarranted and would serve no good purpose.

Counsel for the plaintiff and defendant assured me that settlement discussions had taken place and offered to exert every effort to bring about such a result. They agreed to bring the matter earnestly to the attention of their respective principals. That evidently helped their hitherto settlement efforts, because on August 2, 1974, counsel for the plaintiff and defendant did file a motion for the approval of a settlement agreement between the plaintiff and defendant.

On March 29th, 1974 the first active record participation which the intervenor's counsel exerted was in giving notice of two depositions, one to the successful candidate and the other to Joseph Jeneske. Request was also made for the production of documents.

The next record activity in which the intervenor's counsel participated was on May 28, 1974, when the defendant gave notice to take the deposition of the intervenor, Edward Sadlowski and requested the production of documents.

On June 25th, 1974, notice was given of the taking of depositions by Joseph Rauh, the intervenor's counsel, to Stanley Lachen and Danny Cifalia. A second notice was dated July 16th. Counsel then gave notice of a deposition to Fermine Salinas on July 29th.

Here I comment on the notices given by intervenor's counsel to the various witnesses for depositions and find as a fact that all of these notices and the taking of depositions of those named were irrelevant to the plaintiff's case and superfluous. Rather than detail the depo-

sitions taken by the intervenor, I shall, in order to save time and space, summarize what was attempted by them. In these the intervenor's counsel concentrated on procuring information from the witnesses on the financing of the campaign prior to the election in which Sadlowski was the defeated candidate.

When a party's attorneys admit certain facts, it is incumbent upon the trial judge to give as much credibility as possible to such admissions of counsel. For instance, Leon Despres, one of the attorneys for the intervenor in a letter dated May 24, 1974 to Joseph Rauh, co-counsel for the intervenor, indicated that these depositions had political and not legal significance. Despres stated

> "The reason we felt it necessary to take these depositions was to compel these men to refuse to divulge payments out of USW funds for Evett campaign contributions or expenditures. Since USW said it would take Sadlowski's deposition, I felt it was psychologically very important to have these refusals precede Ed's testimony. Thus his frankness of disclosure will stand in sharp contrast." (Despres Deposition, Exhibit 11).

I repeat, that any financial circumstance would not possibly be a usable element in the plaintiff's case against the defendant, as I presently point out.

Thus, since the majority of the questions asked of the deponents were focused on financial issues, it is corroboratingly evident that counsel claimants were politically motivated to procuring another election to promote Sadlowski and give him another change for victory at a second-chance election, rather than gaining relevant evidence to aid the plaintiff and the court in making findings of fact for the resolution of procedural issues before it.

Discovery concerning the financial issue was irrelevant and nothing gained by these would have been admissible

in evidence in this case, because as the Department of Labor's investigation disclosed, and as not averred in its complaint, there were no violations involving the use of union funds. Therefore, any matter relating to finances would have been inadmissible if this case were tried. In fact, it was the Secretary's final Report of Investigation which concluded that Sadlowski's allegation that "union funds and materials were used to support Evett's candidacy" was "not substantiated by investigation." (pages 71, 73).

INTERVENOR LIMITED BY PLAINTIFF'S

Under the law the intervenor is bound by the pleadings of the case and neither Sadlowski nor his counsel could possibly add an additional claim not included in the Secretary's complaint, or contrary to its averments. In *Trbovich v. United Mine Workers*, et al., 404 U.S. 528, 537 (1972), the Court denied the petitioner's request to add additional grounds for setting aside a union election. Mr. Justice Marshall stated:

> ". . . These are claims that the Secretary has presumably determined to be without merit. Hence to require the union to respond to these claims would be to circumvent the screening function assigned by statute to the Secretary . . . Accordingly, we hold that in a post election enforcement suit, Title IV imposes no bar to intervention by a union members, so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint."

Neither does this court have jurisdiction to inquire into financial matters which the Secretary did not address in his complaint, and am as restricted here as is the intervenor.

While in the briefs there are plenty of self-serving arguments of the extraordinary work done by the claimants outside the courtroom, it is noticeable that not one

single averment is made in any of their pleadings which relates to discovery being conducted in order to support the claim of irregularities in the past election other than financial.

It should be observed perhaps in this connection that the intervenor was frank in revealing the fact that he had a personal interest in the action commenced by the Secretary. This he did, when he filed the motion for leave to intervene under Federal Rule of Civil Procedure 24 on December 20, 1973. There it is stated,

> "7. Petitioner Sadlowski has a direct and substantial interest in the subject matter of this action and is so situated that the disposition of this action and the terms of any order entered will as a practical matter either impede or advance his ability to protect that interest.
>
> 8. Petitioner Sadlowski's interest is not adequately represented by the parties in this action . . ."

Furthermore, in the intervenor's complaint filed December 10, 1973, he adopted and incorporated "by reference the allegations set forth in paragraphs I, II, III, IV, V, VI, XI, XII, XIII and XIV" of the complaint filed by the Secretary.

While in paragraph XIII, the plaintiff stated that "Funds of local labor organizations were used to purchase tickets to a dinner in support of Samuel Evett", it would appear to involve financial matters, but that is the only place where financing of election campaigns is raised. Thus, it would seem that the intervenor might have raised, but even this not legally, financial matters relating to the dinner, and to the dinner only; but his discovery ranged far and wide to legislative and educational funds, to voluntary political education committee funds; to a strike relief fund; and, fourteen other similar financial subject matters. None of these were raised as irregu-

larities by the Secretary. Furthermore, the Secretary ruled, as verified by Ronald Lehman, Counsel for the Department of Labor, that no questionable financial activities were involved. (Lehman deposition, page 35). The intervenor through his able counsel knew that none of these financial issues had any relevancy in the case and knew that he was limited to the issues set forth in the Secretary's complaint. *Trbovich, supra,* at page 537. Accordingly, what the claimants raised in their depositions is so far and wide of the issues presented by the Secretary as to be frivolous. This is also aside from the principle laid down in *Trbovich, supra,* at page 531, that Congress has constituted suit by the Secretary of Labor to be the exclusive post-election remedy for a violation of Title IV.

Thus, I find that the intervenor's depositions were not taken in good faith for the purpose of aiding the court in a fair and judicial determination of the issues in this case. One indication of this is a letter from the intervenor's counsel Rauh to co-counsel Leon Despres dated February 7, 1974. This letter commended the trial attorney for the Secretary as being "able, energetic and quite determined to win" as well as commending the amount of evidence already gathered by the government. The claimants undoubtedly accepted the inevitability of the new election as fact from the report of the investigation of the Department of Labor's Compliance Officers, and so counsel knew that the depositions filed subsequently by notices on June 25th, July 16th and 29th, 1974 were worthless—except for their ulterior, political purposes. I hold that such discovery activities by Sadlowski and his counsel were of no help to the plaintiff and were injected only for self-serving purposes. As such these activities of Sadlowski's counsel cannot be deserving of any equitable compensation by the entire membership of the defendant—or any of the 35 Districts.

CLAIMANTS' OBJECTION TO SETTLEMENT

The next activity by the claimants (personally) on the record file was a request for an oral argument of their objections to the motion for approval of the settlement agreement by the plaintiff and defendant. That was not necessary because I had already scheduled a hearing on the matter in order to ascertain the appropriateness of such a settlement.

At the hearing both counsel for the plaintiff and for the defendant extolled the virtues of a settlement, and stressed the savings of months of trial time and energy. But counsel for the intervenor objected primarily on two grounds: (1) that, since I was requiring that the new election must be held within 90 days of an order of settlement, the forcoming election would be within two or three days of Thanksgiving and inconvenient for voters; and (2) that an election by mailed ballots could not be worked out within 90 days.

I disagreed with the intervenor's counsel and overruled his objections. First, I did not see why an election could not be held before Thanksgiving—and counsel for the plaintiff and defendant agreed that it could and assured me that it would be so held. Second, there was no evidence before me that a new election would be conducted by mail as the intervenor's counsel argued that it would be. I informed all counsel that the method of conducting the election, if specifically voted by the International for future elections, would not bind the Secretary in conducting a second election, and the conduct of an election by this agreed upon order of court would be completely within the discretionary functioning of the Secretary who was required by law to appropriately and adequately conduct the election. I stated emphatically that I would not interfere with the discretion of the Secretary.

ALLEGED BENEFITS CONTRIBUTED BY INTERVENOR-CLAIMANTS

The claimants in their briefs make much of the unusual activity expended by them in bringing about the settlement between the plaintiff and the defendant. I observe here that Rauh, counsel for the intervenor, was a modestly acting attorney in the courtroom, as also were counsel for the plaintiff and the defendant. There was no unusual activity on the part of Rauh which indicated to me that the settlement agreement submitted to me was wrong. All that Rauh attempted to do was argue that there should be no settlement. Secretary counsel, William Kilberg and Stephen Ernst, representing the plaintiff, and Michael Gottesman representing the defendant disagreed with Rauh and together in the courtroom pressed the motion for settlement and the finalization of the case.

Up to that time elections were being held under the International's Constitution at the many fixed places throughout the International area. Counsel for the defendant asserted that the forthcoming convention was to consider the matter of elections by mail. This was discussed only and nothing more. I reiterated that the Secretary was to hold the election in accordance with the Constitution of the International Union, and I emphasized, throughout, that the election must be held within 90 days. It was totally on that basis that I approved the settlement in spite of the fact that Rauh did not withdraw his objections. In fact, he seemed to believe that he was unsuccessful before me because, in related fashion, he stated, ". . . all my arguments have been overruled". (Tr. page 48). Thus, it is obvious that counsel for the intervenor performed nothing to bring about the settlement, and in this respect could not possibly have benefitted the membership of 1,400,000 members.

Accordingly, Rauh's objections gained nothing for the membership and even nothing that would give the inter-

venor more convenience for his forthcoming campaign as a candidate for election. As of that time I had not had all the evidence which I now have before me, but had I then had the full evidence which I now have, I would have realized that Rauh's attempted obstruction of the settlement agreement, which the plaintiff and defendant desired, was not because of any aid to the court for a judicial determination of the case, or for the benefit of 1,400,000 union members, but because Rauh's interjecting not-so-very soluable objections, actually, was to acquire more and extended time for his client's campaigning in a new election. Thus, the objections being an empty gesture, merits no compensatory credits in "bringing out" a settlement.

The evidence of the plaintiff, and in effect corroborated by the admissions of the intervenor's counsel, lent substance to the fact—and I so hold—that the intervenor was a defeated candidate in a labor election, and like millions of defeated American political candidates all the way from committeemen and women to United States Senator, or possibly national presidential elector, or fraternal, corporate, church and even other labor applicants for office, as disappointed candidates, contest unfavorable elections in an effort to reverse them for the purpose of becoming the ultimate victor; so Sadlowski after losing the election count processed his dispute all the way through the internal machinery of the International. Failing there, he made the next challenge to the Department of Labor by the legal authority given him in the Labor Management-Reporting and Disclosure Act, 29 U.S.C. § 482(b).

NON-EXISTENT PROOF OF COMMON BENEFIT TO MEMBERSHIP

To support merit to their claims for fees, the claimants contend that the running of a second election for director of District 31 conferred a benefit not only upon District 31, but upon the entire USW membership; first, because the director of District 31 sits on the International Execu-

tive Board, the governing body of the USW, and as such official he would be of benefit to the entire union membership; and second, because by the re-running of the election in District 31 the entire membership of the USW was put on notice that election improprieties will not be tolerated. So the claimants put into question two conclusory arguments as a basis for proving that the "common benefit" doctrine is applicable to the instant case sufficiently enough to justify an award of attorney's fees, payable by the total International membership.

Judge Van Dusen in *Brennan v. United Steelworkers, etc., supra*, at pages 604-605, stated that the evaluation of the "common benefit" claims must be whether the benefits (1) may be traced with some accuracy; (2) the class of beneficiaries is readily identifiable; and (3) whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefitting.

Examining the claimants' contentions in the light of the evaluations of the common benefit rationale, we keep in mind first the fact that Sadlowski's complaint to the Secretary was not the only one among the thirty-five Districts of the International; that five other complaints were registered; that one other complaint that of Anthony Tomko in District 15 is incorporated in this action with Sadlowski's complaint and that the claimants did not stand out as principal champions and defenders of the 1,400,000 members of the International. The record showed that the Tomko complaint, as well as the Sadlowski complaint were being processed at the same time. and that I, although separately, disposed of each at the behest and common effort of the Secretary's counsel and the Union's counsel. While this part of the record was not introduced into evidence, it is, nevertheless a part of this record as it was before me as Part "A". The settlement of District 15 and the stipulation came before me as a package, as agreed upon between counsel for the plaintiff and defendant and as such, I granted counsel's

motion to settle both Part A and Part B of this case. However, the arguments on each came before me separately and I made separate determinations District 31 did not stand alone, and I know as the presiding judge that District 31 participants did not contribute any aid in the processing of settlement of District 15 in this case.[5]

If, then, the two Districts 15 and 31 were those litigated and settled together as a package, can it be said with any accuracy, with what is before me in this case that the District 31 litigation by the intervenor, helped District 15 also? If so, there is not one bit of evidence in the record or before me that the claimants helped to bring it about. And so far as the claimants' argument that "the entire membership of the USW was put on notice that election improprieties will not be tolerated", it is uncontradicted that at least twenty-nine other Districts did not need such notice because their elections were proper as was verified by the indisputable fact that no complaint was filed by anyone in those particular Districts.

We look at all these principles enunciated by Judge Van Dusen in *Brennan v. United Steelworkers, supra*, that benefits may be traced with some accuracy; that the class of beneficiaries is readily identifiable, and that there is a reasonable basis for confidence of shifting the costs with some precision to those benefitting. In examining the claimants' arguments, which have no foundational facts or evidence to support them, we are left with total doubt as to whether the other 34 Districts can measure up to fitting into the requisites specified by Judge Van

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[5] The record is particularly set forth in my Opinion of December 12, 1974, Docket No. 75A and the Order of Court, Docket No. 76A. See also, affidavits of Attorney Kilberg and Attorney Kleinman, counsel for the Secretary stating that District 15 and District 31 were settled at the same time as they were tied together by the attorney for the Secretary and the attorney for the defendant.

Dusen. That means if the common benefit rationale is to apply, the members of the International in a district in Canada, as well as those members in Pittsburgh (where Tomko filed a complaint for District 15) must be commonly benefitted by what the claimants have presented before me. I find not the slightest shred of evidence that any of these districts or the union as a whole has been benefitted by the claimants action. Furthermore, the evidence in the case before me indicates that there is no divisible fund for each District in the entire International, as all District funds are maintained in the control of the Treasury of the International for the benefit of all 35 Districts (See Affidavit of USW Treasurer Frank McKee dated February 13, 1979).

Thus, if we were to give heed to the claimants' baseless arguments, we would have to divide the fund and no means of measuring the divisible part of the fund could be allocated to anyone or more defendants as applied to their possible obligations to pay the claimants' demands. If there is, we do not know what such method would be—unless it would be to assess the individual population membership of the defendant, which possibly could be held responsible by reason of the conjectural argument of the claimants. Under the principles laid down by Judge Van Dusen, the contentions of the claimants are completely without merit.

In accordance with the guidance of the Court of Appeals, the class of beneficiaries is not readily identifiable because no benefits can be traced "with some accuracy" to any beneficiaries, and so there can be no "reasonable basis for confidence that the costs may be shifted with some precision to those benefitting"—but certainly not to 1,400,000 International members as being commonly benefitted.

Who desired the benefits from the settlement? Well, certainly Sadlowski did in spite of the fact that his counsel opposed it, because there was a new election in which

he won the victory which he had sought originally. The circumstances do not matter as to whether they were hotly contested or not at this time. He, Sadlowski, was victorious. Undoubtedly, he benefitted. And since he was campaigning through his counsel all the way through the continuance of the processing of this action, as was shown to be the case by the evidence produced as a whole, it was Sadlowski's counsel's campaign activities which eventually became victorious.

As for any benefits which might be considered to be "common" to the other Districts, there are only fanciful assertions that all the 1,400,000 International members of the Union will be put on notice that election improprieties will not be tolerated—as if all 1,400,000 such members really were in need of such notice; and further, that the election of Sadlowski would "willy-nilly' have been to the common benefit of the 1,400,000 members—if that benefit was in fact needed, or even that the intervenor's election might not actually have been detrimental to any or all these International members.

What is uncontravertedly obvious to me as a factfinder is that there is no evidence whatsoever that any District including District 31 was affected. If there had been any common benefit to the International or any other District, that evidence should have been presented in the case to make it manifest in order to base a judicial determination entitling the claimants to fees. Otherwise, the claimants required me as a factfinding judge to assume that their argument was a fact and not just a conclusion that the 1,400,000 International membership was commonly benefitted, and more so that the assumed common benefit was a reasonable basis for shifting the costs of the intervenor's campaign to the 1,400,000 International membership with "some precision to those benefitting". But there is no such factual persuasion of precision benefitting. Neither was there any factual persuasion of precision benefitting 126,000 members in District 31, because the claimants'

activities were directed in the irrelevant financial path for procuring inadmissible evidence politically beneficial only to Sadlowski's potential, eventual election. Even here if such character of irregularities required notice to the membership, there is no evidence of that.

Under these circumstances, it is impossible for me to trace "with some accuracy" any benefits bestowed upon any of the membership, and especially upon the International membership, as the "readily identifiable beneficiaries". Neither do the claimants' unproved assumption satisfy the dictates of the Court of Appeals as it reflects upon the principle laid down by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society, et al.*, 421 U.S. 240, 265, n. 39 (1975).

ATTORNEYS' FEES—TRADITIONAL RULE—COMMON BENEFIT

The traditional American rule is that attorneys' fees are not ordinarily recoverable by a successful litigant in the absence of statutory or contractual authorization. However, federal courts "in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require." *Hall v. Cole*, 412 U.S. 1, 4-6 (1973). The inherent power to award such relief "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U.S. 166, 166 (1939); *Hall v. Cole, supra*, at page 5.

Exceptions to the American rule, created by both the courts and Congress have developed in certain situations "in which overriding considerations indicate the need for such a recovery", such as where the "plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionate among them.'" *Hall v. Cole, supra*, at page 5; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-394 (1970). In

gauging the principles in *Hall* and *Mills* to the instant case, I find it impossible to extract from the evidence in this case as a whole any "substantial benefit on the members of an ascertainable class" bestowed by the claimants. Even with the election of Sadlowski as Director, there is no evidence of whether the District 31 membership were better or worse off with Sadlowski as Director.

Initially this "common fund" or "common benefit" exception to the American rule emerged in situations where through litigation the successful plaintiff enhanced or preserved a fund for the benefit of a class of beneficiaries, since it would be unjust for those who benefitted from the plaintiff's efforts not to contribute to the attorneys' fees, either directly or from the fund or property itself. See *Trustees v. Greenough*, 105 U.S. 527, 531-537 (1882).

The case law has developed since then so as to allow, for example, an award of attorneys' fees where a plaintiff sued for her own benefit, and her success entitled others to recover out of the same assets by operation of *stare decisis*, *Sprague*, *supra*, at page 166; where also a plaintiff produced by litigation a non-pecuniary benefit, such as where shareholders conferred a benefit on their corporation by proving a violation of securities' laws, *Mills v. Electric Auto-Lite*, *supra*; and where a union member conferred a benefit on the union by vindiction of his right of free speech guaranteed under the Labor Management-Reporting and Disclosure Act. *Hall v. Cole*, *supra*.

The underlying rationale for the award of attorneys' fees, or "fee-shifting" based on the common benefit theory, however, remains the same. That basis is the prevention of unjust enrichment, because "to allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills*, *supra*, at page 392.

With this rationale in mind in this case, what unjust enrichment accrued to the 34 other Districts and their membership? That the claimants argue that Sadlowski sits on the International Executive Board? So what would happen if he did not sit on the Executive Board? What difference did his sitting make? As the factfinder, I do not know. And the claimants' contention that I should conclude benefits either way could only be by surmise. Equitably, I cannot do this.

Since 29 other Districts (not filing complaints) did not need "to be put on notice that election improprieties will not be tolerated", how were these 29 Districts and their memberships bestowed "common benefits" and thereby derived "unjust enrichment" by anything the claimants did? For that matter, in addition to the memberships in the 29 Districts, what barest suspicion (let alone evidence) can be levelled at the memberships in the other 5 complaining Districts that their complaints were basically of such character with or worse than that of the intervenor's, and that accordingly they needed "to be put on notice that election improprieties will not be tolerated", and that the claimants' activities would produce for such memberships "unjust enrichment" if the claimants' awards were not shifted to them? And if so shifted, how do we separate them from all the other District memberships? All this is a matter purely for surmise and conjecture, and no factfinder can in good conscience make findings of fact on surmise and conjecture. No evidence whatsoever is here supporting any contention that all this is not surmise and conjecture.

On the other hand, neither would it be just to enrich the claimants at the expense of the full membership, or a part of the membership, if the claimants were neither the responsible processor of the litigation nor responsible for its successful outcome, as in this case the settlement was not brought about but rather opposed by Rauh who is now one of those claiming bestowal of benefits. Using

conjecture only what if Rauh had been successful in obstructing the plaintiff's and defendant's stipulated settlement and final determination? Would the case have been required to go to trial and possibly not have been terminated until sometime in 1975.[6] Would the membership of District 31 have benefitted? Or would Sadlowski have been more benefitted because he had more time to campaign unnecessarily? Who would have benefitted? Since the settlement and final determination of the case was not brought about by the claimants, then the intervenor is no less a beneficiary than are the 1,400,000 members, if in fact they are; but the intervenor is almost exclusively the sole beneficiary at the expense of the Secretary of Labor who conducted the total investigative and legal processing and settling of the case. And even taking the proportion down to the smallest number of possible beneficiaries, there is no evidence in the case that the irregularities complained of by the intervenor were of such a level in his District 31 (or in any other District) as to require notice to just the District 31 members that such irregular election activities would not be tolerated.

The claimants rely heavily on *Hall v. Cole, supra*, where the Supreme Court affirmed an award of $5,500 in attorneys' fees to the respondent who was expelled from his union for deliberate and malicious vilification of union management and who subsequently regained his union membership under § 103 of the Labor Management-Reporting and Disclosure Act. The court held that the respondent's suit not only vindicated his own right of free speech guaranteed by the statute, but furthered the democratic interest of the union and its members as well. The Court reasoned by vindicating his own rights, the successful litigant dispelled the "chill" upon the rights of others. The Court, at pages 8-9, stated:

> "Thus, as in *Mills*, reimbursement of respondent's attorneys' fees out of the union treasury simply shifts

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[6] Hearing of March 21, 1974, Tr. 22.

> the costs of litigation to 'the class that has benefitted from them and that would have had to pay them had it brought the suit.' "

The claimants argue that their efforts as well dispelled a similar chilling effect and promoted union democracy. While there can be no doubt that the respondent in *Hall* produced a common benefit for free speech for all members in the union solely through his litigation efforts, the claimants' legal efforts, on the other hand, produced nothing of substance or materiality, nothing that was not, in any event, repetitive or duplicative of the Secretary's intense and massive investigation. Sadlowski's counsel are not precluded from attorneys' fees simply because of Sadlowski's status as an intervenor and the Secretary's dominant enforcement role in this area, but the claimants are not entitled to a free ride on the Secretary's comprehensive accomplishment, without material input; and they are not entitled to compensation for redundant (even if intensive), and at the very best, marginal case work product.

The magistrate also relied on *Wolf v. General Motors-United Auto Workers, Etc.*, 560 F.2d 1266, C.A. 3, 1978. Here our Court of Appeals affirmed a District Court's denial of an application for attorneys' fees by counsel who represented certain auto employees in a suit to obtain supplemental unemployment benefits. When the benefits were disbursed by the administrative board at the proper time, the suit was dismissed on the merits as moot; and the attorneys' fees were denied because counsel failed to demonstrate a sufficient causal relationship between their efforts and the disbursal of the fund under the "common benefit exception". The Court said in the per curiam opinion:

> "[W]e are asked to determine that the efforts of appellants' counsel resulted in a 'common benefit' to a discernible class. Because the facts of this case fall far outside the narrowly circumscribed common

> benefit exception to the general 'American Rule' that attorney's fees are ordinarily not recoverable by a prevailing litigant in the absence of statutory authorization. (citing *Alyeska, supra*), we affirm." (at page 1267)
>
> "The common benefit exception anticipates, and is necessarily preceded by, a proven causal relationship between the efforts of counsel and benefits allegedly derived therefrom." (at page 1268)

The applicants argued that suit was filed against the GM benefits plan and therefore the benefits were disbursed. The Court responded.

> "[I]t would be a logical fallacy to conclude that the resulting payments were caused by an independent suit in federal court." (at page 1268)

Similarly, the claimants here appear to be reasoning that, because Sadlowski intervened, settlement occurred. The claimants have failed to show by any evidence, cause and effect relationship. I have found through examining the actual sequence of litigation and settlement events that the resulting settlement occurred independently and in spite of the actions of one of the claimants, Rauh. Consequently, they have not demonstrated the required "sufficient causal relationship" between any efforts on their part and the resulting settlement agreement or the satisfactory finalization of the case under the "common benefit" exception.

This court sits in this case much like the umpire in a baseball game. While the umpire does not observe the practice and coaching sessions before the game starts, he should from its very inception be the most knowledgeable individual of what in common vernacular "the game is all about". So, too, in this case I am observant of the pleadings and am familiar with their contents. The in-court appearances by the parties came under my close scrutiny. Their in-court participation and activi-

ties premised the fundamental parts which each of the parties, plaintiff, defendant, intervenor and intervenor's counsel played toward the eventual outcome in the determination by me of the case. As I look back over the whole proceedings and review the transcripts and the pleadings, and with special detailed examination of the part which the intervenor and the claimants played, I observed quite clearly the whole process and the record contributions which made the eventual satisfactory termination possible, and must make my findings and decisions in accordance with the facts, both legally and in equity.

SUMMARY OF MAGISTRATE'S FINDINGS OF FACT

The magistrate addressed the threshold issue of whether or not any benefit was bestowed on the membership as a result of the actions of the intervenor and the claimants. After my examination of the record, I affirm and also adopt his findings. He found that:

1. In order to preserve issues for presentation to the Secretary, only minimal requirements are imposed; that these obligations could readily be fulfilled without the assistance of counsel; and that the assistance of counsel was not necessary to preserve matters for presentation to the Secretary.

2. A complaint filed with the Department of Labor need only set forth several allegations, and a formal legal document prepared by counsel is not necessary to invest the Department with jurisdiction to investigate and ultimately to sue.

3. During the period between June 25, 1973 through August 1973 and until recommendation of the Department to file suit, an intensive investigation by the Secretary occurred.

4. The intervenor did not influence the Secretary's decision to sue, as Solicitor Kilberg stated, ". . . [a]t no

point in time, was there ever any doubt that, short of a satisfactory settlement, the Department would sue in District 31."

5. Extensions of time before the filing of suit were for the purpose of allowing USW to investigate the election.

6. Although the intervenor contends that it became necessary to retain Attorney Rauh to expedite the proceedings, the actual intent was to politically assist Sadlowski's new campaign.

7. Despite Rauh's contention that his three or four conversations with Mr. Lagather "caused labor to file suit", the uncontradicted evidence from Solicitor Kilberg creditably demonstrates that Rauh did not provide any factual information which was not already in the Department's files; that Rauh did not advance any legal arguments which the Department had not already considered and that Rauh's statements had no effect on the decision to file suit in District 31.

8. Rauh's efforts at the hearing on the plaintiff's motion for expedited discovery on March 21, 1974 had no effect on the final outcome of the proceedings which took place as rapidly as possible within the limitations of plaintiff's counsel's other commitments.

9. Although the intervenor alleges that he strongly influenced the theory of prosecution by the Department, the evidence from the record, specifically from the plaintiff's trial counsel Ernst, indicates that the theory or prosecution, actual prosecution and settlement of the lawsuit was not affected by anything said or done by the intervenor.

10. The discovery undertaken by the intervenor produced no useful evidence which the Department did not already have as result of the DOL's massive investigation.

11. Although the intervenor claims credit for blocking "unsatisfactory undemocratic settlement proposals",

the contention that the intervenor blocked the splitting of the District is refuted by the evidence from three DOL affidavits which show that this proposal had been rejected by the Secretary prior to its ever having been communicated to the intervenor; and the contention that the intervenor prevented multiple nominations in the rerun election is also refuted by the evidence that this became a moot point when Evett agreed to be a candidate in the rerun election.

12. The intervenor took no helpful or compelling part in the settlement negotiations.

13. The intervenor refused to be a party to the settlement agreement, which had to be redrafted excluding the intervenor as a party.

14. None of the intervenor's objections to the settlement agreement was sustained at the hearing on August 23, 1974.

15. There was no intention of rerunning the Disrtict 31 election at the outside limitation date of November 29, 1974, and thus, the intervenor's claim that his efforts preserved union democracy by preventing the election being conducted on Thanksgiving weekend is without merit.

16. The court broadly approved conducting the election in conformity with Union regulations and Title IV, and no specific recommendations by the intervenor were adopted by the court.[7]

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[7] I have already discussed the settlement procedure before me and cite the Magistrate's findings to show only the accuracy of the Magistrate's observations and holdings. Also, as I refer only to the intervenor in the Magistrate's findings, I infer and include also such claimants as are related to the specific findings or additional findings to include them as any or all claimants in the case before me.

IDENTITY AND DEMANDS OF CLAIMANTS

In examining every facet of the claims which the claimants are making for payment of fees, in fact and in law, I have not overlooked a circumstance that it was Sadlowski (not the claimants) who filed the complaint originally with the plaintiff. I also observe that Sadlowski would have been deprived of the ultimate victory as a Director in District 31 if he had not filed the complaint with the plaintiff, and if the plaintiff after investigation had not brought this action, and if the plaintiff had not worked with the defendant for the ultimate settlement and Sadlowski's eventual victory. To a rational extent, Sadlowski did render some services to the Secretary as he did for himself. This, then, might be considered as a service rendered by Sadlowski personally in aid of the Secretary. I must consider also that Sadlowski did not do this because of his beneficent attitude towards the membership of the International Union, but only because Sadlowski was hoping to benefit personally from the Secretary's conduct. If I could seperate personal services rendered by Sadlowski to the Union, either for the District or the International, I might have been able to fairly and justly determine upon a basis for compensation—if this had been done through attorneys, or even the claimants (even though Sadlowski claims nothing personally for legal costs)—but I have nothing before me to give me the slightest foundation for such a finding and determination. On the other hand, I have before me an abundance of highly credible evidence which indicates that what Sadlowski did before filing the complaint with the Secretary was as a defeated candidate. In this respect a holding that any funds are due Sadlowski for such under the present claims of counsel for compensation would be improper.

While another matter which I have considered is not directly apt in making this holding, I deem it informative to discuss here certain evidence of the claimants which affects the credibility of the assertions and allegations made in support of their claims.

In the narrative statement filed by the claimants and in certain affidavits and depositions as filed by them before the magistrate, a total claim was made for approximately $96,000.00 (Narrative Statement, page 2). A breakdown in these pleadings is as follows:

1. Joseph Rauh, claimant, asserts an expenditure of 235 hours (Intervenor's Narrative Statement, page 7). These hours are taken from entries on a calendar and are summary hours without details.

2. Leon Despres, claimant, asserts an expenditure of approximately 256 hours with some reasonable detail for 167.5 hours, but admits that 88.5 [8] hours have no records at all (Intervenor's Narrative Statement, page 8), and are without details.

3. Judith Schneider, claimant, a law student at the time, asserts expenditures of 1,279 hours, but admits that at no time did she make any time record, and the hours set forth are mostly her estimate (Intervenor's Narrative Statement, page 9), and are without details.

4. Kenneth Yablonski, claimant, asserts an expenditure of 15 hours, which he admits is from memory and unsubstantiated from any diary or record (Intervenor's Narrative Statement, page 9), without details.

In each of these individual claims, the hourly estimate of time was set forth by the individuals on the theory that this was the standard amount claimed under such circumstances, except in the case of Miss Schneider which was based upon what salary she had been receiving.

Miss Schneider is requesting $20.00 per hour in addition to the salary that she received in 1974 from the Association for Union Democracy. She now claims that her hourly rate of pay of $5.00 per hour was a "ridiculously low base figure", and that she should be awarded an additional

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[8] Of course, I question how he could account for 88.5 hours by memory alone.

$25,580.00 out of the Steelworkers' Union dues, without having presented convincing evidence that her work merits any increase whatsoever. (See Narrative Statement at page 11) I find that her work, which was predominately non-legal and political in nature, has already been adequately compensated.

I have cited these only to indicate that I have most carefully examined the record in an effort to give credibility, where credibility was due, and not to deprive the claimants of any just compensation or fees where so entitled. Since I have already discussed these matters before, I merely repeat this now for the purpose of showing one of the elements upon which I have arrived at my conclusion based upon the preponderance of all of the evidence in the case as a whole.

I am also aware of the fact that since our law now is rather liberal in granting attorneys' fees in any number of ways, that oftentimes a claim for counsel fees is abused. I am reminded here of what was held in *Brown v. Stackler*, 612 F.2d 1057, 1059, C.A. 7, 1980. There an attorney made an exorbitant demand which was not supported by the evidence and the district court denied the attorneys' fees as claimed. The Court of Appeals affirmed the District Court decision and in an opinion by Judge Edward Dumbauld stated that such a denial of such an outrageously excessive fee demand will be a ". . . hopefully effective means of encouraging counsel to maintain adequate records and submit reasonable carefully calculated, and conscientiously measured claims when seeking . . . counsel fees." Judge Dumbauld further stated in this opinion:

> "If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place. To

courage such greed a severer reaction is needful, and the District Court reponded appropriately in the case at bar." (612 F.2d, at page 1059).

While I am in agreement with the philosophy laid down in *Brown v. Strickler, supra,* of containing counsel's fees demands ethically within the realm of certainty, I consider the proof of the claimants in this case in the aspect of another element by which I determine credibility. The details of services rendered by them do not add any weight to their claims for entitlement of fees, when viewed in the evidence as a whole as it contains contradictory assertions and arguments made by the claimants.

SUMMARY

The defendant, United Steelworks of America, AFL-CIO-CLC, held an election on February 13, 1973, for the selection of directors in its 35 Districts throughout the United States. Six complained to the plaintiff, the Secretary of Labor, that irregularities had been practiced in their elections. The Secretary immediately put to work his team of expert Compliance Officers to investigate these six complaints. Of these they found two where there was a likelihood of irregularities. These were from Anthony Tomko, the defeated candidate in District 15 in the Pittsburgh area, and from Edward Sadlowski, the defeated candidate in District 31 in the Chicago area.

An overly abundant amount of evidence was amassed both in the Pittsburgh and Chicago Districts under the skilled supervision of the Secretary's counsel; and on the recommendation of counsel this action was commenced by the Secretary. Complainants Tomko and Sadlowski intervened, but Sadlowski gathered around him a crew of attorneys whose prime function was to inaugurate depositions to discover financial matters. The Secretary, however, had held that no financial irregularities were practiced so he did not include such an averment in his complaint as filed in this court. Nevertheless counsel for Sad-

lowski instigated depositions relating to financial matters for the purpose of providing material for a second campaign for the election of Sadlowski, knowing as attorneys that such evidence could not be made part of this case, as such matters went beyond the averments contained in the Secretary's complaint, contrary to *Trbovich, supra.*

Districts 15 and 31 phases of this action were separated into Parts A and B, and both parts were processed before me eventually to settlement terminations. The Secretary's Compliance Officers and counsel had amassed a large amount of evidence as to make it unnecessary for the Secretary to initiate any discovery after the action was filed. The defendant indicated need for discovery in District 31 in Chicago, and at which this court was asked to preside for a week, but that never materialized.

This court in an effort to procure a settlement had learned that the plaintiff and defendant had been negotiating for settlement in both Districts. This court encouraged counsel to continue to do so. Counsel for the Secretary and the International Union eventually presented a motion to approve such a package settlement agreement for both parts "A" and "B", Districts 15 and 31. One of Sadlowski's counsel, who had appeared in the previous two open-court matters before me but had done nothing to further the final determination of the case or aid the plaintiff, also appeared at the settlement hearing on Part "B", District 31 and objected. He presented two reasons for disallowing the settlment; one, that the re-election would be held around Thanksgiving Day as an interferring inconvenience to the membership; and two, that an election by means of mail balloting could not be effective. I overruled both objections. The first, because my order would have included an election under the exclusive supervision of the Secretary of Labor within a maximum period of 90 days to which counsel for the plaintiff and defendant gave me assurance that the re-election would be held before Thanksgiving time; and second, because no

evidence had been presented before me of any mail balloting, and so I concluded that it was injected by counsel for the intervenor superficially for the purpose of preventing the settlment. In discussing this second objection in open court by counsel without contradiction, the question of a mail balloting method was to be presented at the forthcoming convention of the International, but that this could not be retroactive. I ruled that a second election must be held and completely supervised by the Secretary closely and in line with what was the processing of the first election. I held that the objections made in behalf of the intervenor were without merit and dismissed them. I ordered a Secretary controlled re-election in District 31. The new election was eventually held satisfactorily and legally under the efficient supervision of the Secretary and Sadlowski was elected as Director District 31.

Thereafter, a "Verified Application for Attorneys' Fees" was presented to me for payment of various sums of money for four individuals, three attorneys and one law clerk, who had been in permanent employment elsewhere, on declarations of service for the intervenor. No request was made by the claimants for a hearing to support their claims. No records of accounts, no verification of customary and usual entitlement of earnings was presented, and I was presumably required to charge the claims to the members of the International. I was given no factual or legal supports to do so and I denied the claims on the sole question presented before me (a legal one) that the statutory law did not authorize this court to allow counsel fees.

On appeal our Court of Appeals held that while there was no statutory authorization for entitlement for such payments, there was nevertheless an equitable philosophy known as the "common benefit doctrine" which could entitle the claimants to compensation on their presumed averments if proved and if proved pointedly by defined legal and factual guides that such common benefits were traceable with some accuracy to all the members of the International Union as a readily identifiable class of bene-

ficaries. The matter was referred back to me for such determination, and if so proved, in what compensatory amount.

When it came back to me I referred the matter a second time to the United States Magistrate who inquired widely and in depth, and who received a vast amount of affidavits, exhibits and other evidence as would give him a clear and comprehensible knowledge and insight of all the circumstances of the demanded claims. The magistrate made detailed and explanatory findings of fact and set forth many consistencies, inconsistencies and contradictions in the evidence, and as well a recital of legal principles. He recommended denying the claims. The claimants objected and the defendant filed an answer to these objections.

The matter then came to me for further consideration. I re-inquired into all of the evidence in the case as submitted and add findings of fact on the evidence, and of that which came before me as the presiding judge. I observed the details and set forth the inconsistencies and deficencies of the claimants' case as I determine these in findings of fact from the substantial preponderance of the evidence in the case as a whole.

As for the guidelines which Judge Van Dusen in the Court of Appeals had set forth as the method by which the "common benefit" rationale was to be applied and findings made thereon, I find the claimants' case to be totally wanting in fact and in equity in accordance with the prescribed law.

Judge Van Dusen had indicated that, while counsel fees generally might not be available to claimants as I had originally ruled, there was the possibility that the claimants might be entitled to counsel fees for the "common benefit" bestowed to the total membership of the defendant International.

I find from all the evidence that the total membership of the Union was approximately more than 1,400,000;

that these were divided into 35 unions over the United States; that of the 35 unions, only six had complained of irregularities in the past election; that of these 6, only 2 had any substantial basis upon which the Secretary of Labor could proceed in filing this action; that these two complaints were initiated by the two defeated candidates in Districts 15 and 31; that the Secretary had dismissed complaints of irregularities in the other 4 Districts; that 29 of the Districts had no complaints and so we have the right to conclude that these were devoid of any irregularities; that in District 31 the defeated candidate Sadlowski hired a crew of attorneys whose efforts and activities from the beginning were aimed for his eventual election; that his counsel proceeded with depositions relating to financial matters which had no relationship to the issues in the Secretary's case and which would not have been admissible in any evidence in this court proceeding; that all of these claimants' efforts were directed in these channels and none of them for the benefit of the plaintiff or the final determination of the case; that one of the claimants, as counsel for Sadlowski, actually attempted to defeat a finalization of the case by the settlement between the Secretary and the Union, assumedly in an effort to extend the time for campaigning for Sadlowski's eventual election; that if the attempt to prevent the settlement by Sadlowski's counsel had succeeded, the case would have continued on for a year or two, or longer, with no possible benefit to the District 31 members and obviously not to the Union as a whole; that the objections as made for the final settlement in open court before me were without fact and merit, since I had ruled that the election must be held within 90 days and within the law under the exclusive supervision of the Secretary of Labor; that counsel for the plaintiff and defendant cooperated with the court in arriving at the settlement and termination of the case contrary to the wishes of Sadlowski's counsel; that the settlement of Part "A" action relating to District 15 was part of the package settlement with

District 31, Part "B", between counsel for the plaintiff and defendant; and, that I held separate hearings on these and agreed to separate settlements relating to each.

As for the accrual of benefits and to whom, I hold: that Sadlowski's counsel claimants did nothing to aid in the disposition of this case; that the claimants' argument for entitlement based on the statements by the claimants (1) that Sadlowski would be a member of the Executive Board of the International was presented only as an argument with conclusion and without any evidence or showing of how, why or when; and (2) that the claimants' statement, that members of the International would be put on notice that election improprieties would not be tolerated, was not only a baseless but a contradicted speculation because we know that 29 out of 35 International Districts held regular, orderly and compliant elections and the elections in 4 other Districts were held to be in good order by the Secretary, and even in Districts 15 and 31 no proof was presented of any need of warnings. Furthermore, no evidence whatsoever was presented to sustain the requirements enunciated under the common benefit doctrine that (1) the benefits may be traced with some accuracy; (2) the class of beneficiaries is readily identifiable; and (3) whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefitting.

Thus, in fulfillment of the guides placed upon me by the Court of Appeals, I hold that the claimants have not proved by the preponderance of the evidence in this case that the claimants' alleged services resulted in any traceable "common benefit" to the defendant International membership either totally or in identifiable part or parts, or even to the members of Districts 15 and 31; or that there is any reasonable basis for confidence that such a cost or costs can be shifted with some precision to 1,400,000 benefitting members of the defendant or any identifiable part or parts or Districts.

Under all these circumstances I conclude, find and hold that the claimants' services were rendered in behalf of Sadlowski's forthcoming campaign for a new election; that they contributed nothing at all to the plaintiff's case or for the finalization of the case; and that if it had been up to them, the case might yet have been in process. Having been the presiding judge in this case, and having had it come before me and knowing as much of the facts as I did, which were attempted to be contradicted in the claimants' narrative statement, arguments and affidavits, I am fully informed and knowledgeable and able to determine their contradictions, especially about what I did and said in court and their misstatements and exaggerations in that regard, and I arrive at the full capability of making findings of fact from the vast preponderance of the evidence as a whole. In law and in equity, contribution to the individual claimants of the sums claimed by them from innocent and unbenefitted persons belonging to any or all of the unidentifiable membership of the International Union would be unjust and unconscionable.

As for the sums of money claimed here for possible benefits, no evidence exists in the record, let alone a preponderance of all the evidence of the case as a whole, of what services were spent or for whom of the 1,400,000 members of the defendant, or segment of them—all this in accordance with the requirements laid down by the Court of Appeals.

MAGISTRATE'S REPORT AND RECOMMENDATION

Accordingly, after my fullest inquiries into the record, the examination of all the affidavits which were presented and of the further examination of the pleadings as all this was aided by my own recollection in the case, when all these were compared and examined with the findings of the magistrate, I corroborate the very detailed statements and findings of the magistrate. As to this, I find

that the magistrate made long and careful inquiries and set forth detailed facts unerringly. While I am in agreement with the findings of the magistrate, I do not rely upon his report and recommendation, since I have independently made my own findings of fact and conclusions of law and determinations. Also, while I adopt the findings of the magistrate, I basically make my own findings and conclusions additionally with those made by the magistrate. I hold that the evidence shows:

1. Claimants' fees for service lacked a causal connection of "common benefits" to any group of members.

2. Lack of accurate traceable benefits to any group of members.

3. No readily identifiable beneficiaries.

4. Lack of evidence to provide a basis for shifting with some precision costs of alleged benefits.

5. Contradictory and fallacious statements.

6. Insufficient proof in the required burden of claimants by a preponderance of evidence in the case; and,

7. Fractured or non-existent records of entitlement earnings.

It will be seen that I have not only followed the prescription provided by Judge Van Dusen of inquiring into proven "common benefits" accrual to the defendant as a whole, but also to its various component 35 District part memberships, and even as well to any possible proved "common benefit" to District 31 membership, and that I have projected the guideline principles more than required—all for the purpose of making an equitable and legal judgment.

On the record as a whole and on the law by which I am directed, I find insufficient support for the claims for counsel fees as made by the claimants. For all the reasons set

forth in the Opinion, I find that the Verified Application for Attorneys' Fees should be denied.

The Findings of Fact and Conclusions of Law are incorporated and made part of this Opinion in accordance with Federal Rule of Civil Procedure 52.[9]

ORDER OF COURT

AND NOW, TO-WIT, this 31st day of October 1980, for the reasons set forth in the foregoing Opinion,

IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate is adopted by this Court as part of the Opinion, and the Objections to the Report and Recommendation filed by counsel for the intervenor be and the same is overruled, and claimants' "Verified Application for Attorneys' Fees" is hereby denied.

/s/ Louis Rosenberg
United States District Judge

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[9] Rule 52. Findings by the Court
(a) ". . . If an opinion, or memorandum of, decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-957

RAY MARSHALL, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR
Plaintiffs

v.

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC (District 31),
Defendant

v.

EDWARD SADLOWSKI,
Intervenor

JOSEPH L. RAUH, JR.; LEON DESPRES;
KENNETH J. YABLONSKI; and JUDITH SCHNEIDER,
Applicants for Attorneys' Fees

MAGISTRATE'S REPORT AND RECOMMENDATION

I. *Recommendation*

It is respectfully recommended that the verified application for counsel fees be denied.

II. *Report*

Presently before the Court for disposition is a "Verified Application for Attorneys' Fees" submitted by counsel for the intervenor.

On February 23, 1973, Edward Sadlowski wrote a letter to the Secretary of Labor ("the Secretary") protesting the February 13, 1973 election for Director of District 31 of the United Steelworkers of America ("USWA"). Specifically, Sadlowski alleged that in conducting that election, the Steelworkers failed to provide adequate safe-

guards to assure a fair election in District 31, and as a result, he was defeated in his bid for the position of Director of that district.

Following investigation, on November 8, 1973, the Secretary commenced this civil action challenging the election in District 31, and seeking *inter alia* to have the February 13, 1973 election declared null and void, and an order directing that a new election be conducted.[1] On January 18, 1973, Sadlowski was permitted to intervene as a party plaintiff in this suit pursuant to the limited authority contained in *Trbovich* v. *Mine Workers*, 404 U.S. 528 (1972).

After extensive negotiations, on August 2, 1974, a proposed settlement agreement was submitted to the Court for approval. That agreement did not contain any admission of impropriety in the conduct of the election, but provided that a new election for the office of Director of District 31 be held on or before November 29, 1974, under the supervision of the Secretary and in accordance with Title IV of the LMRDA, 29 U.S.C. § 481.

This settlement agreement was approved by the Court on August 23, 1974, with the modification that the election be conducted on or before November 19, 1974. However, the Court retained jurisdiction over the action until the results of the election were certified by the Secretary and an appropriate final decree entered.

On November 29, 1974, a certificate of election was filed by the Secretary, certifying that the intervenor had been elected Director of District 31. In an Order and Decree dated December 2, 1974, it was adjudicated that Edward Sadlowski was the duly elected Director of that district.

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[1] At the time this suit was commenced, the Secretary brought action against both District 31, and District 15. However, the suits against the two different districts were separated on January 21, 1974, and we are here concerned only with that suit challenging the election in District 31.

On January 31, 1975, Joseph L. Rauh, Jr., Leon Despres, Kenneth J. Yablonski and Judith Schneider, counsel for the intervenor, filed the pending application for counsel fees.

Following a hearing on the matter, and in a Report and Recommendation filed on July 22, 1975, the undersigned United States Magistrate concluded that as a matter of law, the recovery of attorneys' fees was precluded under Title IV of LMRDA, and that the application for fees should be denied. Counsel for the intervenor filed exceptions to that Report and Recommendation and the matter came on for further hearing. In a Memorandum filed on December 11, 1975, the District Judge overruled the exceptions to the Magistrate's Report and Recommendation, and adopted the latter as the opinion of the Court.[2]

An appeal was then taken to the United States Court of Appeals for the Third Circuit. Speaking for the majority of that Court, Judge Van Dusen held that as a matter of law, attorneys' fees were not precluded under Title IV of LMRDA, and that the matter must be remanded to the district court for a determination of whether it would be equitable to award counsel fees on a "common benefit theory, and if such an award was appropriate, a computation of an appropriate dollar amount. *Brennan* v. *United Steelworkers of America, Etc.*, 544 F.2d 586 (3d Cir. 1977), [Appendix E, 94a].[3] Judge Aldisert dissented from the majority and filed a separate opinion.[4]

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[2] It should be observed that the discussion of the District Judge in his Memorandum was somewhat broader in scope than the narrow issue determined by the Magistrate.

[3] In a footnote to an Order filed on June 3, 1977 in response to a motion for leave to file an enlarged petition for rehearing, Judge Van Dusen reiterated that the matter was remanded, ". . . solely for reconsideration in the light of the controlling authorities on statutory preclusion and 'common benefit' ".

[4] *Brennan* v. *United Steelworkers of America, Etc.*, [141a].

An application for certiorari was filed in the Supreme Court, and on April 17, 1978 certiorari was denied. 435 U.S. 977 (1978). However, Justice White, joined by Justices Stewart and Rehnquist dissented from the denial of certiorari and stated:

> "The common-benefit exception has in this case been stretched beyond the bounds of its creative rationale, both as to whether a benefit has been shown to exist at all, given the Secretary's dominant enforcement role, and as to whether it is fair to tax the entire union with costs of providing what benefits there might be." 435 U.S. at 980.

The reasoning of the majority of the Third Circuit, Justice White said, was "squarely at issue" with the Court's previous decisions in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

Thus, the case is presently before this Court again, on remand with the specific instruction,

> "Having held that the award of equitable relief is not precluded by Title IV of the LMRDA, and that the intervenor may be entitled to attorneys' fees based upon a common benefit conferred upon the USWA, the district court order and opinion will be reversed, and the case remanded for findings and reconsideration of the liability of the defendant for attorneys' fees.
>
> "Whether an award is warranted and, if so, the amount of such award, is a matter for initial determination by the district court in the light of the broader application of the 'common benefit' rationale. . ." [136a].

In *Hall* v. *Cole*, 412 U.S. 1, 4-6 (1973), the Court stated that:

> "Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in

> the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation . . . and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery . . .'
>
> * * * *
>
> "Another established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.' . . . 'Fee shifting' is justified in these cases, not because of any 'bad faith' of the defendant but, rather, because '[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense' . . ." (footnotes omitted).

That is, the common benefit theory justifying the award of attorneys' fees rests on sound equitable principals which require those who benefit to share the costs of obtaining that benefit.

More recently, in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 257 (1975), the Court recognized,

> ". . . the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit . . ."

Nevertheless, the Court cautioned:

> ". . . [federal] courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach when such judicial rule will operate only against private parties and not against the Government." 421 U.S. at 269.

Thus, it is only within very narrow confines that the equitable principal of awarding counsel fees on a common benefits basis can be allowed.

The petitioners here allege that their enhancement of union democracy through the rerunning of the election for Director of District 31, conferred a benefit upon not only District 31, but upon the entire USW membership in two ways. First, they contend that the Director of District 31 sits on the International Executive Board, which is the governing body of the USW and that therefore his election to that body benefits the entire union membership. The second argument raised by the fee applicants is that by rerunning the election in District 31, the entire membership of the USW was put on notice that election improprieties will not be tolerated.

Against this background, a determination must be made of whether or not the "common benefit" doctrine is applicable to the instant case so as to justify an award of attorneys' fees. As the Court of Appeals made clear,

> "The overriding considerations in evaluation of 'common benefit' claims are whether the benefits may

be traced with some accuracy; whether the class of beneficiaries is readily identifiable; and whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefiting." 554 F.2d at 604-605.

Thus, inherent in this concept is a requirement that a benefit be bestowed; that that benefit may be traced with some accuracy to the class which it purports to benefit; that the class of beneficiaries be readily identifiable, and finally that the costs may be transferred with some precision to the persons deriving benefits.

On February 13, 1973, an election was held for the position of Director of District 31, USAW, in which the intervenor was the unsuccessful candidate. By letter dated February 23, 1973, a protest was delivered to the Chairman of the International Tellers. Following their investigation and on or about April 25, 1973, the Tellers submitted a report sustaining the election results. By letter dated May 1, 1973, the intervenor appealed this decision to the International Executive Board. On May 31, 1973 that Board met, considered the complaint and sustained the Tellers' Report. The decision was communicated to the intervenor by letter dated June 4, 1973, and on June 25, 1973 he filed a complaint with the Secretary of Labor pursuant to 29 U.S.C. § 482(a). Through agreements between the Secretary and counsel for the defendant extensions of time were granted to permit the Secretary to conduct his investigation and determine whether or not to commence suit. Finally, on November 8, 1973 this suit was initiated.[5] In an Order dated January 17, 1974, Sadlowski was permitted to intervene as a party plaintiff in the District 31 action

[5] This suit was initially commenced as an action challenging the election on both District 15 and District 31, and by Order dated January 21, 1974 the challenges were bifurcated into two separate actions at the same Civil Action number but containing separate "A" and "B" designations.

only. An amended complaint was filed on January 28, 1974, and an answer to the complaint was filed on February 12, 1974. Finally, on August 23, 1974 a settlement agreement was approved providing in part that a new election be held on or before November 19, 1974. On December 2, 1974 a final judgment was entered designating the intervenor to be the duly elected director of District 31. On January 31, 1975 the pending verified application for attorneys' fees was filed.

The first issue for resolution is a determination of whether or not there was a benefit bestowed as a result of the actions of the intervenor.

Counsel for the Intervenor contend that their services conferred a common benefit on the USWA members both of District 31, and upon the entire membership by enhancing union democracy, by expeditiously voiding an improper election and causing the successful election of the Intervenor. Specifically, they allege:

> . . . the services of the attorneys enabled Sadlowski to present a proper protest within the union, under a tight deadline, and to the Secretary of Labor and thereby enabled Labor to later file an effective suit; facilitated the Department's own investigation; effectively represented Sadlowski before the Labor Department offsetting the defendant's efforts by a battery of lawyers to abort a suit and successfully urged the Department to bring suit without further delay; secured Sadlowski's intervention in the court case and thereafter cooperated with and prodded the Department in analyzing the plaintiff's case and in discovery procedures assuming all responsibility for depositions; successfully pressed for a speed-up of the litigation; pointed out to Labor the dangers in and blocked undemocratic and unfair settlement proposals advanced by defendant; helped secure, if not caused the securing of, the settlement by the defendant calling for a new election under fair conditions; secured significant modifications, written

and oral, in the settlement which was then approved by the Court; and thereafter helped assure that the rerun election procedures were in fact carried out in a model, democratic fashion by representations to the Secretary in Washington and his representatives in Chicago and by carrying on an effective, grass-roots monitoring and reporting system in Chicago which Labor was unable to do on its own; and bringing about the return of important files of District 31 which had been removed before Sadlowski assumed office. The result was that Sadlowski was elected by a two-to-one margin in the court-ordered, Labor-supervised 1974 rerun election over the incumbent. . ." [6]

Counsel for the Intervenor first claims that their services enabled Sadlowski to present a proper protest within the tight deadline mandated by the union constitution.

The Steelworker's constitution requires that an individual challenging an election must do so within ten days of the election by filing a protest with the International Tellers.[7]

In the present case, the election was held on February 13, 1973, and ten days later, on February 23, 1973, the intervenor filed a protest with the International Tellers.[8] However, during this ten-day period, the Intervenor believed himself inadequate to determine whether or not

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[6] Intervenor's Narrative Statement of Facts in Support of Application for Attorneys' Fees, p. 2-3.

[7] Article V. Section 18, Constitution of International Union United Steelworkers of America. Sadlowski Deposition Ex. 3 (Document No. 147).

[8] The protest of the Intervenor to the International Tellers appears as Exhibit 1 to the Rauh Deposition taken on November 6, 1978 (Document No. 129).

there were grounds upon which to protest the election and therefore turned to Mr. Despres for legal counsel.[9] Despres' records indicated that he had devoted 13.5 hours from the time of his initial contact with the Intervenor to the filing of the protest.[10] Thereafter, Despres contended that he supervised the protest procedure until the May 1, 1973 filing of an appeal to the International Executive Board from the adverse determination of the International Tellers. Although his records only disclose an additional 3.2 hours during this time interval, a closer examination reveals that of this time 1.2 hours was devoted to drafting a letter to the intervenor which is clearly political in nature,[11] and two hours devoted to work for his client on the day that the protest was filed with the Executive Board.[12]

The question then becomes one of determining whether or not legal counsel was required in order to frame such a protest. In his deposition, Rauh indicated that the assistance of legal counsel is necessary.[13] However, this is to be contrasted with the testimony of Lagather, of the Department of Labor, who stated that for a protest to be in a proper posture for the Department of Labor to investigate, it is not necessary that precisely detailed protests be filed with the union, but rather that generally stated objections be made.[14] In *Hodgson* v. *Steelworkers*, 403 U.S. 333 (1971), and *Wirtz* v. *Laborers Union*, 389 U.S. 477 (1968) the Court emphasized that the internal

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[9] See pages 80-81, 93 of the deposition of Sadlowski (Document No. 147).

[10] Exhibit 1, to the Despres Deposition (Document No. 145) which appears as Document No. 146.

[11] Exhibit 3 to the Despres Deposition (Document No. 146).

[12] Exhibit 1 to the Despres Deposition (Document No. 146).

[13] Rauh Deposition of November 6, 1978 (Document No. 129 at pp. 29-30).

[14] Lagather deposition (Document No. 143) at pp. 48-52.

exhaustion procedures must be geared to be exercised by a layman. In the present case, the USWA Constitution provides that protests be made within specified time limitations, but no requirement is established for a format which such protests must follow.

While the record establishes that prior to the election, Sadlowski had contacted the Department of Labor in order to determine whether he could receive post-election assistance from the Department in preparing his protest. Sadlowski testified that he had been told that the Department could not become involved until after the election.[15] By way of contrast, Lehman of the Department of Labor testified that prior to the election he had been contacted on behalf of Sadlowski and explained the mechanics of filing a protest.[16] In addition, the defendant contends that an individual with Sadlowski's knowledge of the internal workings of the union and considerable experience in various functional capacities within the union, should certainly have been capable of filing an internal protest without outside assistance.[17] In addition, Sadlowski testified that he was aware of several areas of irregularity in the conduct of the election, before he ever met with Despres.[18]

When specifically asked,

> ". . . is it your testimony that notwithstanding all that we just said, that you wouldn't have been able to find these problems and this conduct without Mr. Despres' investigative planning?"
>
> "A. No."

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[15] Sadlowski deposition, page 99 (Document No. 147).

[16] Lehman deposition, page 11 (Document No. 179).

[17] Sadlowski deposition, pages 5-68 (Document No. 147).

[18] *Id.*, pages 102-111.

"A. As I understood the question, you said I wouldn't have been able to find them without Despres.[19] The answer to that is no, I didn't say that."

However, Sadlowski clarified this comment:

"I don't know if they would have surfaced or not. I really don't know what kind of question is that. I don't know. . .

"But I would imagine that most of these would have surfaced somewhere down the line as they ultimately do, guys start talking and drinking. I don't know what kind of question that is. You know, I can't answer that because I don't know the answer to that." [20]

That is, Sadlowski himself could not state with any degree of certaintly whether or not the services provided by his attorney were really necessary to discover irregularities.

It would therefore appear that prior to the election and immediately following the election, Sadlowski was aware of his internal rights and was prepared to exercise them. That he found it more comforting to have the assistance of privately retained counsel does not demonstrate that the services of counsel were necessary. Furthermore, the evidence from the Labor Department is strongly indicative of the fact that in order to preserve issues for presentation to the Secretary, only minimal requirements are imposed, and that these obligations can be readily fulfilled without the assistance of counsel.

The Intervenor places some degree of reliance on the first affidavit of Stephen Ernst [21] in which it is stated:

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[19] *Id.*, page 115.

[20] *Id.*, pages 120-121.

[21] This affidavit appears as Exhibit 17A to the first deposition of Joseph Rauh (Document No. 129).

> "It is my opinion that institution of the Department of Labor's complaint, the successful termination of the litigation through a negotiated settlement, and the legal conduct of the rerun election were primarily the result of the Department of Labor's efforts, and in part my own, which were extensive and time-consuming. Nevertheless, I believe it is also true that Mr. Sadlowski's lawyers provided benefit to him and to the Department of Labor by, among other things, seeing to it that Mr. Sadlowski's rights to complain to the Secretary (and thereby enabling the Secretary to file a complaint) were preserved through Sadlowski's observance of the Steelworkers' detailed internal constitutional requirement. . ."

That is, it was the opinion of Stephen Ernst, who was the lead litigation and trial counsel for the Department of Labor in this suit, that Sadlowski's counsel aided Sadlowski in preserving his rights, but no showing has been made that the assistance of counsel was necessary to preserve these interests. Rather, the record here is highly indicative of the fact that the assistance of counsel was not in any way necessary to preserve matters for presentation to the Secretary.

We first have the statements of personnel from the Department of Labor supported by decisions of the Supreme Court that the internal union protest procedures are designed to insure that an individual can readily protect his rights. Secondly, there is the testimony of Sadlowski himself that the elements raised in his protest were basically secured without the aide of counsel, and that while it is highly speculative, it would appear that the assistance of counsel would not have been necessary to gather the various elements of the protest. And finally, there are the records of counsel which indicate that little if any time was devoted to assisting his client in preparing the protest. From all these elements, it would

appear that the assistance of counsel was unnecessary, and that counsel performed little if any service to furthering the Intervenor's protest.

On or about April 25, 1973 the International Tellers rejected Sadlowski's challenge to the election, and on May 1, 1973 Sadlowski wrote to the International Executive Board protesting the election. Through this time, only Despres was involved in the litigation as counsel for the intervenor.

On May 31, 1973, the International Board sustained the election, and the Intervenor's internal remedies had been exhausted.[22] The next step was to file a protest with the Secretary, and this was done on June 25, 1973.[23] While this document is lengthy, it is also true that Despres' records disclose that he only spent 4 hours on its preparation [24] and could only account for his participation in the preparation of a very limited portion of this document.[25]

Furthermore, it is even doubtful if this effort was necessary, since as Lagather explained, a complaint filed with the Department of Labor must only set forth basic allegations, and need not be a formal legal document. Specifically, he responded affirmative to the inquiry,

> ". . . we have been talking about the substance of the member's complaint to the union. Is the same thing true of the complaint he files with the Labor Department, that is, that if he makes general allegations without evidentiary detail and without citing the union constitution provisions or the law, that is

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[22] Article V, Section 21, Constitution of International Union, Ex. EX-3 to Sadlowski Deposition (Document No. 147).

[23] The protest is D-43 appended to the Despres deposition (Document No. 146).

[24] Exhibit D-1 to Despres deposition (Document No. 146).

[25] Pages 130-132 of Despres Deposition (Document No. 145).

sufficient to invest the department with jurisdiction to investigate and ultimately to sue?" [26]

Ronald S. Lehman, who had charge of the investigation of this matter for the Department of Labor,[27] testified that he had rendered advisory information to the Intervenor or his agents prior to the filing of the suit with the Secretary,[28] and was assigned the matter when the complaint was filed with the Department. Upon receiving the complaint he had an informal interview with Sadlowski to review the allegations of the complaint, and followed this with an "exhaustive" interview, and investigation.

Thus, the matter had moved from a protest within the union to the Secretary of Labor with little if any actual input from counsel for the Intervenor, and if in fact such counsel occurred, it is extremely doubtful whether that assistance was necessary to preserve the right to protest the election.

The next period of time is from the filing of a complaint with the Department of Labor on June 25, 1973 through the August, 1973 recommendation of the Department to file suit. During this period of time, intensive investigation by the Secretary occurred, and by August it was apparent that unless the matter could be amicably settled, that suit would be brought.

In his affidavit, William J. Kilberg, who at the time in question was the Solicitor for the Department of Labor, stated:

". . . In early August, 1973, shortly after these reports arrived in Washington, I was told by Robert Lagather, Deputy Assistant Secretary of Labor, that

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[26] Page 52, Lagather Deposition (Document No. 143).

[27] Pages 3-4 of the Lehman Deposition (Document No. 179).

[28] *Id.*, at pages 7-13.

> District 31 was the case where the investigative findings most clearly indicated that suit should be filed. From that point forward, every report I received confirmed the unanimity among the Department's employees, both in the field and in Washington, that suit was warranted with respect to District 31. Looking back, it is clear that at no point in time, once the field investigation had been completed in early August, was there ever any doubt that, short of a satisfactory settlement, the Department would sue in District 31." [29]

While suit was not commenced immediately, it was explained by Kilberg that the delays were made in an effort to permit the USWA to investigate the election.[30] However, the Intervenor contends that repeated extensions in the time within which suit could be brought were granted as a delaying tactic. For this reason, the intervenor contends it became necessary to retain someone familiar with Labor proceedings, and so on August 30, 1973, Despres contacted Rauh in order to enlist his support. Nevertheless, the letter from Despres to Rauh enlisting his support belies this stated motive, and makes clear that the intent was to mount a new campaign for Sadlowski. In that letter Despres wrote,

> ". . . the Department of Labor has found fraud and defects far beyond the ability of the independent group itself to uncover and detect. A new election seems likely. . .
>
> "The problem now is that, in the light of a new campaign, Sadlowski might find it very valuable to have suits started for large amounts of damages arising out of fraud . . .

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[29] Page 4 of the Kilberg Affidavit (Document No. 160).

[30] *Id.*

"I am perfectly willing to call [the Department of Labor], but with the disclosures of Watergate, I do not know how communicative a highly placed official would be by long distance telephone call to Chicago. Can you speak to him? Can you obtain encouragement or information that might help Sadlowski in the campaign?" [31]

Thus, the allegation that Rauh's support was enlisted to ensure that the Department of Labor carried forward its investigation and rapidly concluded the matter is contradicted by the Despres letter in which he seeks Rauh's aide for the purpose of furthering Sadlowski's campaign.

The fee applicants claim that Rauh's interest in the suit and his intervention "caused Labor to file suit." The record contradicts this contention.

In his first deposition, Rauh contended that his function was urging the Department of Labor to bring suit, and in this regard he had three or four conversations with Mr. Lagather.[32] Despite what Mr. Rauh considered his primary function, the record indicates that the Department of Labor had already reached a conclusion that either an amicable settlement be concluded or that suit be filed. In his affidavit Solicitor Kilberg stated:

". . . Mr. Lagather advised me that he had received one or more phone calls from Joseph Rauh on behalf of the District 31 complainant, Edward Sadlowski, urging that the Department file suit with respect to the District 31 election. Mr. Lagather's report of Mr. Rauh's phone calls played no part in my decision to file suit in District 31. Mr. Lagather did not tell me that Mr. Rauh had provided any factual information which was not already in the

[31] Exhibit D-4, to Despres deposition (Document No. 146).

[32] Pages 35-36 of the November 6, 1978 deposition of Joseph L. Rauh, Jr. (Document No. 129).

> Department's files, nor that Mr. Rauh had advanced any legal arguments which we had not already considered . . . The mere fact that lawyers representing private parties urged the Department to act one way or another, by itself, had no effect on the decisions I made while Solicitor of Labor; my decisions were based on the evidence available to me. In the District 31 matter, the evidence already in the Department's files had convinced me that suit should be brought . . ." [33]

And finally, Rauh himself stated in a letter to Despres,

> ". . . the thing you really asked me to do was to insure the filing of the suit by the Secretary of Labor. Although I did everything I could on that, it is not unlikely that the suit would have been filed if I hadn't been in the case at all." [34]

Thus, it would appear that Rauh himself admitted the validity of the Secretary's contention that his entry into the suit was of no consequence to the Secretary's decision to commence this action. While suit was not commenced immediately upon the receipt of all evidence recommending such action in August 1973, it has been explained that suit was not filed until November 8, 1973, in an accommodation reached with the USWA, and not out of dereliction of duty or intention to avoid an unpleasant task.

We must next turn our attention to the role played by the Intervenor once the Secretary filed suit.

It is a matter of record that the complaint was filed on November 8, 1973, and that pursuant to Court approved stipulations, the time for filing an answer was extended on three separate occasions. On January 21, 1974 the complaint was separated into two causes of

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[33] Page 5, Kilberg affidavit (Document No. 160).

[34] D-6 to the Despres deposition (Document No. 146).

action, one as to District 15 and the other as to District 31. A week later on January 28, 1974, an amended complaint was filed so as to set forth a claim as to District 31 exclusively, and on February 12, 1974 an answer was filed. Pursuant to a motion by the Secretary an order was entered on March 21, 1974 providing for expedited discovery. That the desire to secure expediated disposition of the matter originated with the Secretary is apparent from the Ernst affidavit.[35]

While these applicants contend that their efforts caused the Court to establish an expedited discovery schedule, the record does not support this contention. At the hearing on the motion for expedited discovery, counsel for the Secretary and the USW agreed that although expedited discovery was highly desirable, certain commitments of counsel would prevent them from proceeding as rapidly as they desired. While Rauh opposed any delays, the Court rejected his position and agreed that discovery be conducted as rapidly as possible within the limitations of counsels' other commitments.[36]

While counsel for the intervenors allege that they strongly influenced the theory of prosecution that was being employed by the Secretary in preparing for trial, Ernst clearly stated:

> ". . . My theory of the case remained unchanged throughout the prosecution of the lawsuit and was not affected by anything said or done by counsel for intervenor." [37]

Thus, the discovery phase of litigation commenced. Counsel for the intervenor contended that prior to intervention there had been no discovery and thereby urges one to draw the implication that it was their intervention

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[35] Ernst Affidavit, paragraph 4 (Document No. 161).

[36] Document No. 33.

[37] Paragraph 6 of the Ernst affidavit (Document No. 161).

which initiated the discovery procedure. It should be noted that the intervention occurred prior to the filing of the amended complaint and the answer and prior to the initiation of formal pretrial proceedings. In addition, in his affidavit Ernst laid aside any possible inference that the efforts of counsel for the intervenor had any material bearing on the ultimate disposition of this case. He stated:

> ". . . as a result of that investigation [prior to filing the suit], I began the case with several file drawers full of materials and evidence in my office, and boxes of additional materials and evidence in the Chicago Regional Office of the Labor Management and Services Administration of the Department. With these materials and evidence, my case was more than complete without the need to engage in formal discovery. It was because my case was thus complete that I in fact engaged in little formal discovery, not because I was relying on counsel for the intervenor to do any discovery. If I had deemed it worthwhile to engage in additional discovery efforts, I would have done so; I would not have relied on counsel for intervenor to put the Department's case together. Indeed, in addition to the formal discovery processes, I had at my disposal a highly motivated and skilled staff of federal investigators; had I deemed further fact investigations called for I would have relied on these investigators, and not on counsel for intervenors . . .
>
> "As far as I know, the discovery taken by counsel for intervenor during the course of the District 31 litigation produced no useful evidence that I did not already have by virtue of the Department's investigation. As I have already stated, I was not relying on that discovery and certainly did not request that counsel for the intervenor undertake it." [88]

[88] Paragraphs 5 and 7 of Ernst Affidavit (Document No. 161).

During this period, counsel for the intervenor took five depositions but it is also apparent that at least three of these depositions produced,

> ". . . marginally important information, all of which has a beneficial cumulative effect. . . The reason we felt it necessary to take these depositions was to compel these men to refuse to divulge payments out of USW funds for Evett campaign contributions or expenditures . . ." [39]

See also: Document No. 162, Kleinman Affidavit, paragraph 16. This is especially noteworthy in view of the fact that the intervenors were prohibited from raising finance issues in this case. *Trbovich* v. *Mine Workers*, *supra.*, at 537.

Applicants next claim credit for "Blocking of Unsatisfactory Undemocratic Settlement Proposals". Specifically, they claim credit for blocking an informal proposal to split District 31, and for preventing a multiple nomination election rather than a rerun of the two-way Evett-Sadlowski race.

It should be noted that the applicants' contention that they prevented a splitting of the District into two Districts is without merit since this proposal had been rejected by the Secretary prior to its ever having been communicated to the intervenor.[39a]

The intervenor also claims credit for prevention of multiple nominations.

The possibility of reopening nominations arose when it was believed that there was a possibility that Evett would not run again in a new election. In such an event,

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[39] Exhibit D-11 to the Depres Deposition (Document No. 146).

[39a] See: Kleinman Affidavit (Document No. 162). See also: Kilberg Affidavit (Document No. 160, ¶¶ 14, 23) and Lagather deposition (Document No. 143, pp. 37-38).

unless nominations were reopened, the intervenor would be the only candidate in the rerun election.[39b] However, when Evett agreed to be a candidate in the rerun election, the problem of reopening nominations vanished.[39c]

In view of the evidence which the Secretary had secured, an intense period of negotiations occurred between the Secretary and the USWA in an effort to arrive at a settlement which would be satisfactory to all concerned. However, during the negotiation process, counsel for the intervenor was excluded.[40] It would then appear that when a settlement was achieved, counsel for the intervenor refused to be a party to it and therefore the settlement agreement had to be redrafted excluding the intervenor as a party.[41]

Ultimately, the matter was presented to the Court for consideration, and set down for hearing on August 23, 1974. At that hearing, counsel for the intervenor raised several objections to the proposed settlement but finally conceded that "all my arguments have been overruled. . ."[42]

One main benefit which the intervenor attributes to his effort is the changing of the date set for the election. In the original proposed settlement agreement, it was provided that a rerun election "will be held on or before November 29, 1974."[43] The intervenors seized upon this cut-off date and alleged in their opposition to the settlement:

[39b] Kilberg Affidavit (Document No. 160, ¶ 18).

[39c] *Id.* paragraph 27, Kleinman Affidavit (Document No. 162 ¶ 14).

[40] Paragraph 22 of the English Affidavit (Document No. 167).

[41] *Id.* at paragraph 35.

[42] See: Transcript of hearing held on August 23, 1974 at p. 48.

[43] Paragraph 2 of the proposed settlement agreement (Document No. 53).

> "The postponement of the election until November 29, 1974 is a further unnecessary delay compounding the inordinate previous delays. The actual final date permitted by the proposed order is the day after Thanksgiving which will deny the right to vote to all those out of town over that weekend. . ." [44]

Intervenor now alleges that he was instrumental in having the election date changed from November 29, 1974 to an earlier date. However, even his own motion in opposition to the settlement agreement recognized that November 29 was an outside limitation, and as counsel has argued here, there was no intention of running the election on that date, but rather it was merely utilized as an outside cut-off date. That this is true is supported by documentary evidence.[45] Thus, the intervenor's claim that his efforts saved union democracy by preventing the election from being conducted during the Thanksgiving weekend is without merit.

Counsel for the intervenor also seek credit for assuring that certain procedures were complied with during the rerun election. However, the record demonstrates that the Court broadly approved conducting the election in conformity with union regulations, and Title IV.

Thus, the record reveals that the intervenor, an individual who was most familiar with union practices, could have prosecuted his internal appeals and application to the Secretary without the assistance of counsel. Once the Secretary became involved, extensive investigation was conducted by the Labor Department, and then negotiations entered into between the Secretary and the USWA. All this was prior to the permissive intervention in this suit. Once permitted to intervene, counsel for the inter-

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[44] Document No. 53.

[45] English Affidavit (Document No. 167 ¶ 31); Ernst Affidavit (Document No. 161, ¶ 11); Lagather Deposition (Document No. 143 pp. 46-48).

venor did pursue certain avenues of discovery, but at all times this discovery was unnecessary to the Secretary's investigation of whether or not improprieties occurred during this election. Having determined that improprieties had occurred, the Secretary entered into further discussions with the USWA in an effort to achieve an amicable settlement of the litigation. Once this settlement was achieved, it was unsuccessfully opposed by counsel for the intervenor, and ultimately a rerun election was conducted and the intervenor was the successful candidate.

The record does contain indications that counsel for the intervenor readily recognized the fruitlessness of their concern with the subject matter of having the election rerun, since they conceded that the Secretary had more than ample evidence to require a new election. Rather, the evidence discloses that counsel for the intervenor were concerned with assuring that their candidate be elected in the forthcoming rerun election, and therefore seized the opportunity to capitalize on the viability of this suit to further his election goal.

It warrants repeating that in *Hall* v. *Cole*, 412 U.S. at 5-6, the Court stated:

> "Another established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. . . . 'Fee shifting' is justified in these cases, not because of any 'bad faith' of the defendant but, rather, because '[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.' . . ."

As applies to the facts of the present case, the record does not substantiate the claim of the intervenor that his

actions benefitted the union as a whole. Rather, at best, his actions might have benefitted his own candidacy by creating certain campaign advantages. The Secretary in the present case, with his vast manpower, thoroughly investigated the election and determined that a rerun election was necessary and conducted that election. No activity of counsel for the intervenor influenced these matters.

As the Court stated in *Wolf* v. *General Motors-United Auto Wkrs., Etc.*, 569 F.2d 1266, 1268 (3d Cir. 1978):

> "The common benefit exception anticipates, and is necessarily preceded by, a proven causal relationship between the efforts of counsel and the benefits allegedly derived therefrom."

The record in this case reveals that the efforts of the Secretary brought about the satisfactory resolution of the election difficulties and that this same result would have been achieved with or without the efforts of counsel for the intervenor. That is, the efforts of counsel for the intervenor did not provide any substantial benefit either to the Secretary or to District 31 or the USWA, but at best served to assist the intervenor in assuring his success in the rerun election. Pursuant to the mandate of the Court of Appeals, 554 F.2d at 608, and for the reasons set forth above, it is determined that an award of counsel fees based on the "common benefit" rationale, is not warranted in this case.

For this reason it is respectfully recommended that the verified application for counsel fees be denied.

Respectfully submitted,

/s/ Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate

Dated: June 7, 1979

APPENDIX D

IN THE UNITED STATES SUPREME COURT

ORDERS

April 17, 1978

No. 77-643

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

v.

SADLOWSKI ET AL.

C. A. 3d Cir. Certiorari denied. Reported below: 554 F. 2d 586.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The Court's action today lets stand the ruling by a panel of the Court of Appeals for the Third Circuit that attorney's fees are awardable to intervenors in union election challenges processed under Title IV of the Labor Management Reporting and Disclosure Act (LMRDA), 73 Stat. 532, 29 U.S.C. § 481 *et seq.* The issues presented in this case are of serious importance to the proper enforcement of the LMRDA, and also to the prosecution generally of private claims that benefit a broad class of persons.

The decision below rested on two necessary foundations that the scheme of Title IV of the LMRDA did not foreclose the awarding of attorney's fees to intervenors, and that the "common benefit" exception to the American rule against awarding attorney's fees could fairly be applied to a case of intervention under Title IV such as occurred here.

In *Trbovich* v. *Mine Workers*, 404 U.S. 528 (1972), this Court held that intervention by an individual union member whose initial complaint commenced the challenge to the election was not inimical to the LMRDA. Title IV anticipates that objections to the conduct of union elections be initiated by union members filing a complaint with the Secretary of Labor after exhausting union remedies. Thereupon, however, it is the exclusive province of the Secretary to commence a civil action in federal district court. 29 U.S.C. § 482(b). *Trbovich* held that the union member who initiated the challenge might still intervene in the federal suit, "so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint." *Trbovich*, *supra*, at 537. This conclusion represented a very careful balance between Title IV's commitment of enforcement authority to the Secretary's sole discretion, and a recognition that the union member who originally raised the complaint might wish to see his claims pressed in some manner different from that of the Secretary.

The opinion below threatens to upset that delicate compromise. Intervention by union members in support of the Secretary's grounds of complaint was upheld in *Trbovich* only because it would make the union liable "to relatively little additional burden," and would "not subject the union to burdensome multiple litigation, nor will it compel the union to respond to a new and potentially groundless suit." *Trbovich*, *supra*, at 536. Once attorney's fees are assessable against a union on behalf of intervenors, however, the union has indeed become liable to an "additional burden" that could be quite costly. And the adjudication of whether an intervenor has contributed significantly to the common benefit of all union members could well involve the "burdensome multiple litigation" that the restrictions on intervention imposed by *Trbovich* were intended to avoid.

Although not controlling, the Secretary of Labor's views should also be considered in any matter concerning

the proper enforcement of the Act he is to administer. It is significant, therefore, that the Secretary has in this case broken his silence on the attorney's fees question for the first time. It is the position of the Secretary that the awarding of attorney's fees to intervenors "significantly impedes the effective enforcement of Title IV." *

The other holding below, that intervention in such a case as this contributes to the "common benefit" of the group to be assessed the attorney's fees, raises problems of its own. A judge-made exception to the traditional American rule against awarding attorney's fees, the "common benefit" theory is premised on a court's equity power to allocate a portion of a fund won for a class of persons through the efforts of a single person to compensate that single person. See *Hall* v. *Cole*, 412 U.S. 1, 5 n. 7 (1973). Subsequent elaboration extended the early theory to cases where no single class of persons was suing, *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161 (1939), and to cases involving a common benefit other than a tangible pool of assets. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall* v. *Cole*, *supra*.

The contribution made by an individual union member, however, who intervenes in an action brought by the Secretary of Labor, can only with great difficulty be viewed as the creation of a common benefit. The Secretary has already investigated the case, and is already conducting the suit. And the rationale permitting intervention was not to duplicate the efforts of the Secretary. Intervention was held permissible in *Trbovich* in order to protect a union member's interest, or his choice of how to represent that interest, precisely to the extent that the individual's interest *diverged* from the Secre-

* Memorandum on Behalf of Secretary of Labor 2. The Secretary believes that the availability of attorney's fees will encourage excessive intervention since, no matter how great or small the assistance an individual might have provided the Secretary, it is only by intervening that he can hope to receive compensation.

tary's. The Secretary is the champion of the " 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.' " *Trbovich*, *supra*, at 539, citing *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 475 (1968). Hence, the rationale that provides for the right to intervene in the first place substantially undercuts the intervenor's claim to be creating a significant *common* benefit not already provided by the Secretary.

The Third Circuit panel, in adopting a common-benefit theory, correctly observed that our opinion in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), recognized the continuing vitality of that theory. More questionable, however, is whether the court below took proper account of *Alyeska's* explanation of the antedating opinions that applied a common-benefit theory:

> "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." *Id.*, at 265 n.39.

The intervenor's contribution admittedly need not be the provision of a monetary sum. However, the lower court's reasoning that a new election in a single district benefited the entire membership of the United Steelworkers of America in such an identifiable and proportionate way as to justify burdening the entire membership with the intervenor's attorney's fees represents logic squarely at issue with *Alyeska's* construction of the common-benefit theory.

Both holdings of the lower court appear to conflict with this Courts' decisions. The awarding of attorneys' fees to intervenors in Title IV proceedings threatens seriously

to obstruct the administration of the LMRDA. The common-benefit exception has in this case been stretched beyond the bounds of its creative rationale, both as to whether a benefit has been shown to exist at all, given the Secretary's dominant enforcement role, and as to whether it is fair to tax the entire union with the costs of proving what benefit there might be. I would grant certiorari to resolve these important issues affecting the administration of the LMRDA and the conduct of all common-benefit litigation.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Before VAN DUSEN and ALDISERT, Circuit Judges, and BROTMAN, District Judge.*

OPINION OF THE COURT

VAN DUSEN, Circuit Judge.

This is an appeal from a district court order, arising out of an action brought by the Secretary of Labor (Secretary) under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481 *et seq.*,** to set aside an election for district director of District 31 of the United Steelworkers of America (USWA or Union). In this election, Edward Sadlowski, the intervenor-plaintiff, was narrowly defeated allegedly due to voting irregularities which violated LMRDA. After settlement was reached, a new election was held, which Sadlowski won by a substantial margin. The present appeal concerns the district court denial of intervenor-plaintiff's application for attorneys' fees and expenses incurred in the process of protesting and assisting the Secretary in attacking LMRDA violations.

This appeal presents important problems in the administration of Title IV of the LMRDA. The district court held that a defeated candidate for union office who intervenes in an action brought by the Secretary of Labor to void an election is precluded by the statute from recovering an award of attorneys' fees against the

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* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

** See Appendix for the most pertinent provisions of Title IV (29 U.S.C. § 481 *et seq.*).

union, and that even if there is no statutory preclusion such an intervenor may not recover attorneys' fees under the "common benefit" doctrine for his actions in complaining to the Secretary, participating in litigation, shaping a settlement, and helping to police a rerun election.[1] The Secretary takes no position on the district court denial of attorneys' fees.

Disagreeing with the district court as to both statutory preclusion and "common benefit," we will reverse this district court order and remand for further consideration of this record in the light of the applicable legal principles and for further proceedings consistent with this opinion.

I. HISTORY OF THE CASE

As noted below at pages [48a, 121a, 126a-127a], this appeal is before the court on a motion to dismiss in which defendants requests that the application for attorneys' fees "be dismissed on its face (see pages 126a-27a] be-

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[1] The district court concluded:

". . . I find no support in fact or in law for the grant of counsel fees in a suit brought under the general provisions of Title IV of the L.M.R.D.A., 29 U.S.C. §§ 481-483.

* * * *

". . . The exception . . . recognized by the Third Circuit . . . [is] . . . (2) the conferring of a common benefit for the recovery of a fund or property;

* * * *

"Counsel for the intervenor has failed to demonstrate the existence of . . . a basis in law or a recognized exception to the general American rule which recognizes an award of attorneys' fees."

Brennan v. *United Steelworkers for America*, Civil Action No. 73-957 (W.D.Pa. December 11, 1975), [reproduced in Appendix G, 154a-158a].

We disagree with the above-quoted conclusion of the district court as applied to this record.

low), without regard to the actual truth of (1) the allegations in this application, and (2) the statements in the other record documents, such as depositions. We emphasize that we are not passing on the truth of the statements in the record or on the character of the intervening plaintiffs, as opposed to that of the high-ranking officers of the union, but we are required, under the posture of the case as it existed at the time of the district court order from which the appeal was taken, to take all well-pleaded allegations in the record as true for purposes of this appeal and to construe them in the light most favorable to the plaintiffs (see page [126a-27a]). These record facts are important in the determination of whether the district court was justified in rejecting the application for attorneys' fees as a matter of law, rather than making its decision as a matter of discretion in the light of the record facts before it.

On February 13, 1973, the USWA held an election for the position of district director of its District 31. That unit, with approximately 300 locals and 130,000 members in Illinois and Indiana, is the largest district in the Union. This election for district director was the first to be contested in nearly twenty-five years.

The candidates were Edward Sadlowski and Samuel Evett, the personally chosen successor to the district's long-time director, who was retiring after thirty years in office. Evett, in the words of then USWA President I. W. Abel, was the candidate of the Union's "official family."[2] Abel explained that the "official family" was composed of incumbent district directors and the officers of the International Union. The benefits of "official family" membership included automatic support—financial and otherwise—in their election efforts.[3]

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[2] Deposition of I. W. Abel at 5-7, Document No. 62B in *Brennan v. United Steelworkers of America*, Civil Action No. 73-0957B (W.D.Pa., Filed August 22, 1974).

[3] *Id.* at 6-16.

Early election returns gave Sadlowski a lead, but a complete tabulation took nearly three days. During that period Sadlowski received reports of widespread violations of LMRDA, such as ballot fraud, illegal electioneering, deprivation of secret ballot, and interference with observers. The final tabulations published by the USWA International Tellers were: Evett 23,394, and Sadlowski 21,606. In view of the reports of massive irregularities, Sadlowski immediately sought legal assistance to aid him in protesting the election in accordance with the requirements of the USWA constitution.[4] Such a challenge was mandated by the LMRDA requirement that international union remedies be exhausted as a prerequisite to filing a complaint about an election with the Secretary of Labor.

Sadlowski's protest was submitted to the USWA International Tellers on February 23, 1973, and a hearing was held on March 23, 1973. In late April 1973 the Tellers issued a report upholding the election of Evett. By letter dated May 1, 1973, Sadlowski appealed that decision to the USWA International Executive Board, again in accordance with the Union constitution. On May 31, 1973, with President I. W. Abel presiding, the

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[4] Article V of the Constitution of the International Union of the United Steelworkers of America (AFL-CIO, CLC, adopted at Las Vegas, September 21, 1972) provides in relevant part:

> "Sec. 18. All contests in connection with the votes of any Local Union must be filed with the International tellers not later than ten (10) days after the date of election, by a member of the Local Union whose vote is contested.
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> * * * *
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> "Sec. 21. All contests growing out of the report of the International Tellers shall be filed with the International Executive Board, not later than ten (10) days following the mailing of the report to the Local Unions and candidates. The International Executive Board shall decide all such contests prior to June 1, of the election year."

Board considered Sadlowski's complaint. On that same day the report of the Tellers was sustained.

Sadlowski then filed a timely complaint with the Secretary, pursuant to Title IV of the LMRDA, 29 U.S.C. § 482(a). The Department of Labor completed its Report of Investigation in August 1973, and on November 8, 1973, the Secretary instituted suit in the Western District of Pennsylvania seeking to void the District 31 election. Sadlowski's motion to intervene as a plaintiff was granted by the district court in January 1974.

After extensive pretrial proceedings, in which Sadlowski's counsel played an active role, the district court approved a settlement agreement, on August 23, 1974. It directed that a new election for the district director be held on November 19, 1974. In this new election, Sadlowski was elected director of District 31 with 39,637 votes to 20,158 for Evett. An order and decree, based upon the Secretary's certification of the election results, was entered on December 2, 1974.

On January 31, 1975, counsel for Sadlowski submitted a Verified Application for Attorney's Fees and a supporting memorandum. The district court referred the application to a magistrate. After briefing and argument, the magistrate recommended that the request be denied. Sadlowski filed exceptions to the magistrate's recommendation, and after a hearing the district judge overruled the exceptions and adopted the Magistrate's Report and Recommendation, making the sweeping legal conclusion set forth in note 1 above. This appeal followed.

II. ISSUE OF STATUTORY PRECLUSION

The threshold question in this case is whether an award of attorney's fees to an intervenor-plaintiff such as Sadlowski is precluded by Title IV of the LMRDA.[3]

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[3] This issue has apparently been considered only once before on the appellate level, by the District of Columbia Circuit in *Usery v.*

The Union advances two reasons for finding preclusion, both of which fall under the rubric of the nature and comprehensiveness of the remedial scheme: (1) the absence of specific authorization to award attorney's fees under Title IV, and (2) the fact that the primary enforcement responsibility for Title IV rests with the Secretary of Labor rather than with private litigants. We disagree, because we have concluded that the district court had the right, in its discretion, to award attorneys' fees on the record in this case. We hold that the district court did not have the power to reject the claim for attorneys' fees on the basis of the legal conclusions stated in note 1 above, which we reject.

A. *Absence of Specific Authorization for an Award*

The Union urges that an award of attorneys' fees under Title IV of the LMRDA is precluded by the absence of any specific provision for such an award in Title IV, in

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Local Union 639 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., 543 F.2d 369 (D.C.Cir. 1976) (hereinafter *Local 639*), *cert. denied sub nom. Local Union No. 639 v. Marshall*, —— U.S. ——, 97 S.Ct. 1159, 51 L.Ed2d 573 (1977). We are greatly aided by the analysis of Judge Leventhal, and reach similar conclusions on very similar reasoning.

Local 639 differs from the instant case in that there the court granted summary judgment for the Secretary and intervenors, holding certain conduct to have been violative of Title IV; here a settlement agreement was reached whereby the USWA agreed to conduct a new election. As the *Local 639* opinion noted, and as we find, the difference is not significant. Ultimate success in the form of a judgment has not been required in other contexts, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Yablonski v. United Mine Workers*, 151 U.S. App.D.C. 253, 466 F.2d 424, 431 (1972), *cert. denied*, 412 U.S. 918, 93 S.Ct. 272, 37 L.Ed.2d 144 (1973); *cf. Kaham v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied sub nom. Glen Alden Corp v. Kaham*, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970), and Sadlowski's efforts and success are undiminished by the method used to achieve them.

view of specific provision for either attorney's fees or appropriate relief in Titles I, II, III and V.[6] It buttresses this contention by noting that Congress rejected a bill, H.R. 8342, 86th Con., 1st Sess. § 402(a) (1959), which provided for union member suits under Title IV, and authorized the award of appropriate relief, including attorney's fees.

USWA primarily relies upon *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967) for the proposition that an explicit, comprehensive, and exclusive remedial scheme may bar the recovery of attorney's fees. In *Fleischmann*, the Supreme Court held that, because the remedial provision of the Lanham Act specifically "provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances," (386 U.S. at 719, 87 S.Ct. at 1408), such precise specification of remedies, encompassing authority which could as a practical matter be used to relieve the burden of counsel fees, presented a strong case against further judicial relief. Although we agree that a truly comprehensive remedial scheme may bar such an award in certain circumstances, we believe that the analytical method embraced by *Fleischmann* was substantially undercut by

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[6] Title I, the bill of rights of union members, relies upon private enforcement and provides for "such relief . . . as may be appropriate," 29 U.S.C. § 412. Title II, reporting provisions, also relies upon private enforcement, but expressly provides for the discretionary award of attorney's fees, 29 U.S.C. § 431(c). Title III, union trusteeships, provides for private enforcement, and, like Title I, approves relief as may be appropriate, 29 U.S.C. § 464(a). Title V, fiduciary responsibility of union officers, gives union members the right to sue, and specifically indicates that attorney's fees are part of the "appropriate relief" recoverable, 29 U.S.C. § 501(b).

later Supreme Court decisions, thus casting considerable doubt upon the interpretation urged by the USWA.[7]

In *Fleischmann*, the Court was willing to find preclusion in Congress' selective provision of attorney's fees in other statutes and unsuccessful efforts to enact a similar measure into the Lanham Act. But in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) and *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), the Supreme Court enunciated a presumption against preclusion and sanctioned "common benefit" awards in the context of statutory causes of action despite the provision for attorney's fees in other sections of the same statute. *Mills*, 396 U.S. at 390-91, 90 S.Ct. 616; *Hall*, 412 U.S. at 10-11, 93 S.Ct. 1943.

In *Hall*, the Supreme Court held that a plaintiff in a suit instituted under Title I of the LMRDA could recover attorney's fees even though Title I does not specifically authorize such an award. It stated that unless remedies are "meticulously detailed,'" to "'mark the boundaries of power to award monetary relief,'" 412 U.S. at 9, 93 S.Ct. at 1948, or the legislative history presents an unmistakably "'definite and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with established equitable principles,'" *id.* at 12, 93 S.Ct. at 1950, "it will not be inferred that Congress desired to deny to the courts the traditional power to grant equitable relief in the form of counsel fees in appropriate cases.

At oral argument the Union's counsel contended that the rejection by Congress of a version of Title IV that provided for direct private enforcement and attorney's fees was conclusive evidence of an intent to limit the courts' exercise of their equitable powers in suits under Title IV. Such intent cannot, in our view, be drawn

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[7] *See* Comment, The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.*, 38 U.Chi. L.Rev. 316, 321-25 (1971).

from the legislative record. As the Supreme Court's review of this legislative history in *Trbovich v. United Mine Workers*, 404 U.S. 528, 532-36, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972) makes clear, congressional debate centered upon the relative merits of enforcement actions by union members and by the Secretary of Labor—not upon the propriety or the possibility of equitable awards. *Local 639* pointed out:

> "The Conference Committee and the House ultimately adopted the public enforcement scheme of the Kennedy-Ervin bill, S. 1555, presumably because they agreed with the Senate that the Secretary should screen frivolous complaints and consolidate meritorious ones.[51] This legislative history, as *Trbovich* holds, 'can in no sense be read as a rejection of all forms of private participation in enforcement litigation,' because Congress never focused on 'the possibility that union members might assist the Secretary rather than displace him.' *Id.* at 536, 92 S.Ct. 630. Similarly, while Congress adopted a particular mode of enforcement, it failed to address with any detail the scope of relief, or what the court's role would be at the remedial stage. [One footnote omitted.]"

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[51] The Conference Report simply states that the Senate bill's administrative enforcement scheme prevailed over the House bill's private suit provision, without tendering any explanation for the outcome. H.R. No. 1147, 86th Cong., 1st Sess. 35 (1959).

543 F.2d at 387. In no sense can this legislative history be said to offer the affirmative guidance the Union asserts that it does. As Professor Archibald Cox, a principal consultant to the draftsmen of the LRMDA, has suggested:

> "because much of the bill was written on the floor of the Senate or House of Representatives and because so many sections contain calculated ambiguities

> or political compromises . . ., the courts would be well advised to seek out the underlying rationale without placing great emphasis on close construction of the words."

Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich.L.Rev. 319, 852 (1960). To hold that the undiscussed, unexplained adoption of an alternative enforcement scheme satisfies the "definite and absolute" standard promulgated by *Hall* would, in this case, be incorrect.

Nor do we believe that the remedial scheme created by Title IV approaches the meticulous detail of the provision involved in *Fleischmann*—or the detail necessary for a finding of preclusion of equitable powers and remedies. Since its enactment, the LRMDA, and Title IV, enforcement scheme has been filled out by the court with many details. In *Hall v. Cole*, which dealt with preclusion of the exercise of equitable powers and the award of attorney's fees under Title I of the LRMDA, the petitioners argued that Congress intended to preclude any such award under Title I since it only provided for "such relief (including injunctions) as may be appropriate," while §§ 201 (c) (29 U.S.C. § 431(c)) and 501(b) (29 U.S.C. § 501 (b)), expressly provided for attorney's fees. In response, the Supreme Court stated that:

> "Confronted with a virtually identical situation in *Mills*, we explained that the inclusion in certain sections of the Securities Exchange Act of 1934 of express provisions for recovery of attorney's fees 'should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate. . . .' 396 U.S., at 391-91, 90 S.Ct. [616], at 625."

412 U.S. at 11, 93 S.Ct. at 1949.

Title IV itself has been the subject of considerable judicial elaboration and expansion. In *Trbovich*, *supra*, the Supreme Court held that union member intervention in suits brought by the Secretary for violation of Title IV was not precluded by the fact that actions by the Secretary are the exclusive post-election remedy provided for by the statute. *Trbovich* was extended in *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975), which held that union members are entitled to a statement of supporting reasons where the Secretary decides not to pursue the union member's complaint.

The fact that the Supreme Court has found it necessary to supplement the structure of Title IV on two occasions suggests that the guidelines of *Hall* (see page [101a] above) have been met by the facts of this case. Also, *Trbovich* and *Bachowski* go much further toward supporting the view that:

> "notwithstanding the absence of a broad relief provision in section 402, the court in a Title IV action faces the same task as if it were adjudicating a union member suit under other titles—to grant relief according to the necessities of the case, *i.e.*, to fashion 'appropriate' relief."

Local 639, 543 F.2d at 388. The question is not whether a union member is entitled to recover attorney's fees under the statute alone, where the role prescribed for him is complaint to the Secretary after exhaustion of internal union procedures. The question is what relief a union member is entitled to after having intervened in and participated in the prosecution of an action brought by the Secretary under Title IV *in the manner anticipated by the Supreme Court in Trbovich.*

B. *Intervenor's Role in Administrative Enforcement*

At the outset of this inquiry, it is clear that the Secretary has the exclusive power to bring post-election challenge suits, and that aggrieved candidates are permitted

to intervene solely to support the Secretary's complaint and may not add substantive claims. *See Trbovich*, 404 U.S. at 530-37, 92 S.Ct. 630. However, correct as those observations are, they overlook the role of union members and intervenors in prosecution of Title IV violations, and the relationship between union members, intervenors, and the Department of Labor under both the statute and the relevant Supreme Court decisions.

Even absent the gloss of case law, it is apparent that the Congress intended to rely heavily upon the vigorous efforts of union members in prosecuting Title IV violations. The statutory framework embodies a critical role for union members.

The initial burden of enforcement falls upon the individual member, and the Secretary's role is defined by those efforts. The first step in enforcement, under section 402(a), is for a union member to challenge the election before the union. Once remedies available under the union constitution and by-laws have been exhausted, or have been invoked without obtaining final decision within three calendar months, the union member may, within one calendar month thereafter, file a complaint with the Secretary alleging violation of any provision of Title IV.

Once the union member's complaint has been filed with the Secretary, section 402(b) directs the Secretary to investigate it. If he finds probable cause to believe that a violation has occurred and has not been remedied, he must, within 60 days after the filing of such a complaint, bring a civil action in federal district court against the labor organization to set aside the invalid election. If the court finds a violation of Title IV it may declare the election void, and direct the conduct of a new election under the Secretary's supervision.

As the Supreme Court's review of the legislative history, in *Trbovich*, 404 U.S. at 532-33, 92 S.Ct. at 633, indicates:

> "Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones, and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court. The alternative proposals were rejected simply because they failed to accomplish these objectives. There is no evidence whatever that Congress was opposed to participation by union members in the litigation, so long as that participation did not interfere with the screening and centralizing functions of the Secretary."

The addition of the exhaustion requirement, under section 402(a)(1), provides additional protection for the union, since unions are thereby given the opportunity to resolve union member complaints internally and may correct any election irregularities themselves. Yet, as is undeniably apparent, at the same time Congress sought to prevent frivolous litigation it created a pivotal role for union members in the enforcement process.

In fact, quick action and skillful advocacy are probably most important at the initial stages of the enforcement scheme, when infractions must be identified, a bill of particulars formulated, the internal union procedures exhausted, and a complaint drafted for presentation to the Secretary. Prompt, thorough, and proper action in the earliest stages is essential to vindication of Title IV rights, since preservation of all election defects is a prerequisite to government intervention. The Secretary may not seek to avoid an election on bases not raised in "some discernible fashion" by the complainant before the union, *Hodgson v. Local 6799, Steel Workers*, 403 U.S.

333, 340-41, 91 S.Ct. 1841, 29 L.Ed.2d 510 (1971), or which the union did not have a fair opportunity to consider and redress. *Wirtz v. Local 125, Laborers*, 389 U.S. 477, 484, 88 S.Ct. 639, 19 L.Ed.2d 716 (1968). The clear effect of Title IV is to make the Secretary dependent upon the diligence of the union member. The Secretary's very authority to sue derives from the union member's pursuit of Title IV remedies and subsequent formal filing of a complaint with the Secretary.

Since *Trbovich*, union members play an even more significant role in the prosecution of Title VI violations, as intervenors. As the United States Court of Appeals for the District of Columbia Circuit noted in *Local 639*:

> "It is not difficult to conceive of examples of material assistance to the Secretary and the court in the vindication of the interest—of the public and the union rank and file—in union democracy. . . . [C]ounsel representing the intervenor may unearth material and even elusive evidence, or develop telling arguments in support of the Secretary's claims of illegality. . . . [T]he *Trbovich* court envisioned that intervenors would perform a role independent of the Secretary in helping the court fashion a suitable remedial order, and perhaps even assist the Secretary in supervising the conduct of the rerun. . . . [S]ound principle advises that error is more likely to be exposed when intervenors are able to secure competent counsel because of the prospect of recovering attorney's fees." [Footnotes omitted.]

543 F.2d at 384.

The notion of private participation in the prosecution of Title IV violations, notwithstanding the involvement of the Department of Labor, is fully consistent with the form and purpose of this statute. Not only is the intervenor often in a position to obtain information which might, for whatever reason, be difficult for the agency

to marshall or preserve, but his perspective and the intensity of his interest allow him to contribute to the court's total understanding.[8]

Sadlowski's experiences and activities in protesting election irregularities provide a vivid illustration of obstacles which complainants and intervenors face—and the insights their involvement can render. They also offer a glimpse into the actual operation of Title IV.

After suspiciously late returns from key locals, and reports of Title IV violations during the February 13, 1973 election, Sadlowski decided to contest the reported results and sought legal assistance. His need for counsel cannot be doubted. From the time, three days after the election, that Chicago attorney Leon Despres agreed to represent him, Sadlowski had only seven days to file an appeal with the USWA International Tellers, under the terms of the Union constitution. To appeal an election involving 300 locals with 130,000 members is no mean task under the most congenial circumstances, and time constraints, combined with the necessity for accurate, complete, and properly presented claims firmly underscore the fact that Sadlowski's decision to seek legal assistance in the prosecution of the challenge was neither gratuitous nor whimsical.

As noted above, Title IV of the LMRDA requires that the complaining union member exhaust internal remedies before complaining to the Secretary of Labor. But even after those procedures have been pursued, the Secretary is dependent upon the substance of the union member's complaint to the union.

During the seven-day period after he agreed to aid Sadlowski, Despres examined the USWA constitution and procedures, and the applicable legal authorities. He interviewed Sadlowski and numerous witnesses, and assisted Sadlowski in interviewing still other witnesses. He prepared affidavits and statements, and gathered docu-

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[8] Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv.L.Rev. 721, 746 (1968).

ments, Sadlowski submitted his protest of the election to the USWA International Tellers on February 23, 1973. During the month between submission of his protest and the date which had been set for hearing, Despres continued to supervise efforts to obtain evidence for the hearing, and prepared materials for Sadlowski to utilize at the hearing (which Despres was not permitted to attend).

When the International Tellers upheld the result of the disputed election, and Sadlowski decided to contest their decision, Despres aided him in exhausting internal union remedies through assistance in his appeal to the International Executive Board. Sadlowski appeared before that body, presided over by USWA President I. W. Abel (who had previously campaigned for Evett). Despres was not permitted to accompany Sadlowski at the Executive Board hearing.

When the International Tellers report was upheld by the Union leadership, Sadlowski resolved to complain to the Secretary pursuant to 29 U.S.C. § 482(a), requiring that a complaint be filed within 30 days of exhaustion of union remedies leading to denial of relief. In preparation, Despres interviewed witnesses to obtain statements and conferred with Sadlowski for the purpose of preparing materials to be filed with the Department of Labor in order to induce the Secretary to challenge the election. Despres assisted Sadlowski in the preparation of a brief and argument for the Secretary of Labor, which accompanied the actual complaint filed with the Secretary. The materials and complaint presented to the Secretary totalled nearly 100 pages.

Under these circumstances, the Department of Labor relied almost exclusively upon Sadlowski's charges in conducting its investigation. The compliance officer in charge of the investigation noted that in making its inquiry the Department concentrated upon those locals at which Sadlowski alleged the most egregious violations

to have occurred. Sadlowski's allegations were borne out by the Department's own investigation.

Nevertheless, the Department did not bring suit within the 60 day period required by statute, and instead agreed with the USWA in both July and August of 1973 to extensions of time within which any action might be brought. Sadlowski and Despres became understandably apprehensive about the Department inaction, in view of findings by Department investigators of wrong-doing. Concerned about the prospect of further delay, they agreed that Sadlowski should seek the assistance of a Washington, D.C. attorney, Joseph Rauh, Jr., experienced in LMRDA proceedings. Rauh agreed to assist Sadlowski and Despres.

Shortly after Rauh was retained, the Department of Labor agreed to the further extension of the time for bringing any action until November 1973. Rauh immediately protested the extension to the Department, and no further extension was granted. Rauh familiarized himself with the election and informed the Deputy Assistant Secretary of Labor of the nature and degree of the violations which had occurred. Rauh also indicated his intenton to bring suit to set aside the arbitrary inaction of the Secretary if suit were not instituted by November. *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). The Secretary did institute suit challenging the District 31 election, on November 8, 1973. Sadlowski's counsel thereupon assisted him in intervening in the Secretary's action and obtaining the aid of local counsel from Washington, Pennsylvania, Kenneth Yablonski. Upon the granting of intervention Sadlowski and his counsel enlisted the aid of a younger New York attorney, Judith Schneider, to assist in the considerable task of gathering and presenting evidence.

Although the suit had been filed in November 1973, and despite Congress' apparent intention that such suits

be expedited, the first significant step in prosecution of the action occurred after Sadlowski's intervention in January 1974, and a February 1974 meetng with Department of Labor officials at which Sadlowski's attorneys urged prompt action in the case. The Department officials informed Sadlowski's attorneys at the meeting that the latter could be of valuable assistance to the Department in following up leads and in providing information relevant to the prosecution of the case. The USWA finally filed its answer to the complaints, and the Department, armed with information provided by Sadlowski's attorneys and at their urging, took its first step toward discovery: the service on the USWA of a request to produce documents. The Department also filed a motion for expedited trial and to fix the discovery calendar, which Sadlowski's attorneys supported by an extensive memorandum urging a prompt resolution of the case. In response, the USWA asserted that it would be difficult to begin discovery until August 1974.

The district court conducted a hearing on the Department's motion on March 21, 1974, and was critical of the delays both in the Department's filing of the complaint, and in the USWA's filing of its answers. Counsel for both the Department of Labor and the USWA indicated that they had tentatively agreed that discovery could begin as late as August of 1974. Sadlowski's attorneys opposed such a schedule and urged that discovery should begin immediately and be completed as soon as possible. Accepting the recommendation of Sadlowski's attorneys, the district court ordered that discovery be completed within 90 days.

Nevertheless, the only Department of Labor discovery which took place within that 90-day period turned out to be the April 1974 service of interrogatories on the USWA. Also in April, Sadlowski's attorneys were advised that settlement negotiations were taking place between the Department and the USWA. A Department

official informed Sadlowski's counsel that the Department was considering USWA proposals to divide District 31 into two parts (Illinois and Indiana), and another proposal to conduct a new election, but with a reopening of nominations. Sadlowski's attorneys strongly protested these proposals.* The ultimate settlement agreed to by the Department did not include either proposal.

In early May 1974, Sadlowski's attorneys were advised by the Department of Labor Regional Solicitor in Chicago that he believed continued efforts by Sadlowski would materially aid in securing USWA capitulation and agreement to a new election. Also, a Department lawyer in Philadelphia told Sadlowskis' lawyers that Department investigation would proceed no further. Sadlowski's counsel thereupon continued their own investigation into the improprieties in the original election, particularly into ballot frauds by local union officials, and the use of union funds for Evett's campaign. Among other activities, Sadlowski's attorneys took the depositions of Evett, and his campaign manager. They also noticed the depositions of presidents of local unions within District 31 where considerable evidence of ballot fraud was found; there were allegations of involvement by Evett's staff in those instances. In at least one local, the membership had imposed fines and suspension upon its president and tellers for vote fraud. An International Commission of USWA officials later recommended that the fines and suspensions be lifted. Sadlowski's attorneys protested this action in a telegram to the International Executive Board, which decided to reject the recommendation.

When the Department sought Sadlowski's consent to the proposed settlement agreement, in July 1974, Sadlowski's attorneys proposed changes in the settlement calculated to assure a fair election. They moved for a

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* The proposal to change Sadlowski's elective base seems clearly prejudicial, as might be any additional nominations which would divert some of Sadlowski's support.

hearing on the Department/USWA motion for approval of the settlement, at which the suggested amendments were presented to the district court. But while urging the court to exercise its power to assure fair terms for a new election, Sadlowski's attorneys indicated that any new election, however unfair, would be preferable to further delays, Sadlowski's attorneys were successful in achieving a stipulation that there would be no changes in the boundaries of District 31, as had previously been suggested by the Department and USWA, and they convinced the court that the new election should be held before November 19, 1974, as opposed to the November 29 date proposed in the agreement—which fell on Thanksgiving weekend and might well have resulted in a small turnout for the new election. In addition, Sadlowski's attorneys argued their case against a mail ballot, the use of which was ultimately abandoned by the Department.

At the same August 29, 1974 hearing the district court also made it clear that it expected Sadlowski to forward a plan for a fair election to the Department of Labor, and his counsel did forward to the Secretary an extensive application seeking orders which would insure a fair election. The Department of Labor indicated, in October 1974, the actions it had taken in response to Sadlowski's requests, and stated that it had gained the USWA's agreement to abandon the mail ballot in favor of on-site voting in the new election. The Department also required that certain staff contributions of time and money to union-backed candidates be circumscribed and carefully controlled, and that records of such contributions be maintained. In direct response to Sadlowski's request, the Department also agreed to issue an order forbidding union staff members from campaigning on union time or utilizing union facilities for campaigning. The Department also decided to order the USWA to prepare certain lists of information relating to the various locals within District 31, and to provide such information to

all candidates, including Sadlowski. The record makes clear that the impetus for many of these actions was Sadlowski's urging.

As a result of further prodding, the Department of Labor held a pre-election conference in Chicago. Sadlowski's counsel succeeded in proposing and embodying numerous provisions in the rules for the upcoming election, including: a provision for custody of ballots in and accrediting of election observers by the Department of Labor; a provision requiring that the election supervisor be given the identity and addresses of various worksites (and that the same be given to Sadlowski as well); a provision for record-keeping as to contributions by staff representatives of the USWA to candidates in the election. Sadlowski's counsel later persuaded the Department to send a letter with the election rules to the effect that campaigning on union time by union staff employees was improper.

The Department of Labor also agreed with the suggestion of Sadlowski's counsel that observers be permitted at the sites to assist the Department in monitoring the election, and conceded that it alone could not enforce the election and campaigning rules. The Department therefore encouraged the filing of complaints relating to election violations, and Sadlowski's attorneys undertook to assist the Department in enforcing those rules and insuring a fair election. Sadlowski's counsel were also active in widely disseminating the rules, and encouraging union members to report violations, and they pinpointed particularly problematic procedures, and problem locals. At their urging, the Department implemented systems designed to speed the checking of voter eligibility and avoid voting card fraud and delays from two few voting lines. The final Department of Labor figures for the election were: Sadlowski 39,637 and Evett 20,158. By the time of the election, Evett had held the disputed position for over a year and one-half.

This detailed recapitulation of the actions undertaken by Sadlowski's attorneys is not in any sense intended to denigrate or detract from the enormous effort which the Department of Labor devoted to the prosecution of the violations and the conduct of a fair election. The record makes clear the many thousands of man-hours which the Department spent on this case, and we do not suggest that they were other than conscientiously and profitably expended. However, we disagree with the district court characterization of the efforts of intervenor Sadlowski's counsel as "self-serving and at the most a mere fraction of and duplicitous of the work entrusted to the Secretary by the Congress." *Brennan v. United Steelworkers of America, District 31, Sadlowski, Intervenor*, Civil Action No. 73-957 (W.D.Pa. December 11, 1975) [reproduced in Appendix G at 154a-158a]. As the survey above suggests, an intervenor can fulfill many functions, and the better the lawyers involved the better this scheme will function. As *Local 639* indicates:

> "As the Secretary's determination to take no position on this issue [of the propriety of an award of attorney's fees] suggests, allowance of attorney's fees for union member efforts in aid of the Secretary's action does not undercut the exclusivity of the administrative remedy. 'Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aid of Title IV.' *Wirtz v. Local 153, Glass Bottle Blowers*, 389, U.S. 463, 88 S.Ct. 643, 19 L.Ed.2d 705 (1968)."

543 F.2d at 385-86. The agency and the intervenor perform truly different roles, with, in our view, considerably less overlap and waste than the district court found. The Department of Labor performs a quasi-judicial, rather than a purely adversarial role in Title IV cases. Its duty is to the public, its own policies, the union interest, and the individual. In deciding whether to institute suit,

what to complain of, and what to settle for, the Secretary must constantly weigh competing interests and duties. Before the *Trbovich*-intervenor existed, the statutory scheme involved only one party truly comporting itself in an adversarial posture: the union. But since *Trbovich* the "union interest" is defined by two parties with adverse viewpoints—even if their interest in the union remains a common denominator. The Secretary, in this circumstance, occupies a more tenable position since he has not only his own expertise in the field, but, in addition, the benefit of the crystallization and presentation of issues and viewpoints we associate with the adversary process. The intervenor's role created by *Trbovich* is thus that of an adversary to the union in developing the facts and the legal issues. What the issue of statutory preclusion of the exercise of equitable powers boils down to in this context is the question of how empty a role the Supreme Court intended to create. Considering the complexities of internal union remedies, complaint to the Secretary, and recourse to the courts, and the penalties for lack of legal or technical sophistication, we cannot believe that intervenors were intended to proceed *pro se*. To have anticipated the depth and quality of involvement, expertise, and enterprise shown by Despres, Rauh, Yablonski and Schneider for a fee which the USWA would have the courts find themselves powerless to award would be to deny *Trbovich* all effect. While we do not consider the propriety of an award of attorney's fees for union member assistance in pursuing Title IV violations where suit is not brought or the complainant does not intervene, we note that courts and legislatures do not ordinarily create roles—strong roles—and then deny their existence by refusing to recognize the existence of the means to fulfill them effectively. Nothing has been suggested to us which indicates that the Secretary's role could be or has been threatened by Sadlowski's attorneys, and it is difficult to imagine more vigorous or skillful action. Nothing in either the statute or the legislative history of the LMRDA suggests to us the preclusion of the

courts' traditional equitable power to provide complete relief in light of the statutory purpose.

We hold that an award of equitable relief is wholly consistent with Title IV of the LMRDA. Our consideration of the basis for such an award in this case, "common benefit," follows.

III. "COMMON BENEFIT"

Although the traditional American rule disfavors the award of attorney's fees in the absence of statutory or contractual authorization, the federal courts have the inherent power to fashion such equitable relief, payable by those enjoying a common benefit, under certain circumstances, *see, Hall v. Cole*, 412 U.S. at 4-5, 93 S.Ct. 1943; *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), and have not hesitated to use this power where "overriding considerations indicate the need for such a recovery," *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92, 90 S.Ct. 616, 625, 24 L.Ed.2d 593 (1970); *see Fleischmann*, 386 U.S. at 718, 87 S.Ct. 1404. The courts have been particularly sensitive to the need and desirability of the allowance of attorney's fees in cases where a plaintiff's prosecution of an action confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them," *Mills*, 396 U.S. at 393-94, 90 S.Ct. at 626. In such cases, "fee-shifting" has been deemed appropriate because "to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.* at 392, 90 S.Ct. at 625; *Hall v. Cole*, 412 U.S. at 6, 93 S.Ct. 1943. The vitality of this "common benefit" exception has been affirmed recently by the Supreme Court in *Alyeska Pipeline Co. v. Wilderness Society*, 412 U.S. 240, 257-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1957).

As the *Alyeska* Court stated, the roots of this exception lie in "the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorney's fees from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed." Id. at 257-58, 95 S.Ct. at 1621, citing *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882). As pointed out by Judge Leventhal in *Local 639*, 543 F.2d at 382-83:

> "This 'historic power of equity, essentially an application of the court's power when seized of jurisdiction over a case to award complete relief so as to prevent unjust enrichment, has developed well beyond the 'common fund' limitation of *Greenough*. In *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), the Court recognized power in the district court to reimburse a plaintiff's litigation expenses even though she sued for her own benefit and not for a class, because her success would by operation of stare decisis entitle others to recover out of the same assets. There is no prerequisite of pecuniary benefit, as was made clear by *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-94, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), a case involving a judicially implied right of action under the Securities Exchange Act of 1934 to challenge materially false or misleading proxy solicitation.[29] *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), extends *Mills* to an express statutory

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[29] Mills permits 'depart[ures] further from the traditional metes and bounds of the [common fund] doctrine' where 'litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs among them.' 396 U.S. at 393-94, 90 S.Ct. at 626.

cause of action. "This development remains undisturbed after *Alyeska* because the 'common benefit' rational was not involved in that case.[30] and the Court made clear that 'Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney fees.' 421 U.S. at 259-60, 95 S.Ct. at 1623. *See also F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129-30 & n. 18, 94 S.Ct. 2157, 40 L.Ed2d 703 (1974).[31]

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[30] See 421 U.S. at 245, 259-60, S.Ct. 1612, noting that this court's decision in *Alyeska* disclaimed reliance on the traditional equitable exceptions of 'common benefit' and 'bad faith.' *Wilderness Society v. Morton*, 161 U.S.App.D.C. 446, 449, 495 F.2d 1026, 1029 (en banc, 1974).

[31] For examples of post-*Alyeska* 'common benefit' decisions, *see National Treasury Employees v. Nixon*, 172 U.S.App.D.C. 217, 521 F.2d 317 (1975) (mandamus action to require the President to grant pay adjustments required by statute); *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555 (7th Cir. 1975) (stockholder derivative suit and class action); *Harrison v. United Transp. Union*, 530 F.2d 558 (4th Cir. 1975) (suit by railroad conductor against union for breach of duty of fair representation).

"The issue here is whether the 'common benefit' rationale may be applied to the case of union member intervention in a suit brought by the Secretary to enforce electoral rights and maintain the integrity of a union election. The appropriateness of 'fee-shifting' in the union democracy context suggests an affirmative answer, unless Congress can be said to have evidenced a purpose to bar the award of such fees."

Mills, supra, makes clear that the "fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this [common benefit] rationale," 396 U.S. at 392, 90 S.Ct. at 625—despite the fact that the early cases based recovery upon the production or

preservation of a "common fund." However, *Mills* involved a judicially implied right of action under the Securities Exchange Act of 1934 to challenge materially false or misleading proxy solicitation, and *Hall v. Cole* provides the connecting link to this case, since it extended *Mills* to a statutorily created cause of action under the LMRDA.

Alyeska has no effect on the development or application of the "common benefit" exception, since it was not an element of that case, and, as the Supreme Court stated: "Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney's fees," 421 U.S. at 259-60. 95 S.Ct. at 1623.

As Judge Leventhal recognized in *Local 639:*

> "With respect to LMRDA, the courts have uniformly applied a 'common benefit' analysis to award attorney's fees to private litigants. The Supreme Court in *Hall v. Cole*, . . . endorsing earlier decisions of the Third Circuit [*Gartner v. Soloner*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040, 88 S.Ct. 1633, 20 L.Ed.2d 302 (1968)] and this court, held that attorney's fees may be awarded for suits brought to enforce the 'Bill of Rights' guarantees of Title I of LMRDA. This court's decision permitted the recovery of attorney's fees for a suit under Title V, which places union officials under federally defined fiduciary obligations. *Bakery & Confectionery Workers Int'l Union v. Ratner*, 118 U.S.App.D.C. 269, 335 F.2d 691 (1964). *Ratner* was extended by this court to a suit brought under section 401(c), the only privately enforceable provision in Title IV. *Yablonski v. United Mine Workers*, 151 U.S.App. D.C. 253, 466, F.2d 424 (1972), *cert. denied*, 412 U.S. 918, 93 S.Ct. 2729, 37 L.Ed2d 144 (1937). And, recently, the Fifth Circuit applied the reasoning of

these decisions to a suit brought under Title III, which regulates union trusteeships, a provision enforceable by either the Secretary or union members directly. *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir. 1976).

"Significantly, in none of these decisions was there a statutory provision that expressly authorized the award made. Rather, the governing rationale was that union members by bringing suits against their union help vindicate the statutory policy in favor of union democracy which necessarily redounds to the benefit of the entire membership." [footnotes omitted.]

543 F.2d 382-83. We have no doubt that this statute was intended to provide union members with protection from the type of attempts to thwart the wishes of union members and impair union democracy which appear to have occurred in this case. The dissent makes the remarkable statement (page [147a]) that no proof is cited for the facts stated in this opinion, in spite of repeated references in this opinion (see pp. [98a, 121a-26a, 134a] to the unchallenged and uncontradicted Verified Application for Attorneys' Fees (89a-146a). We note that the Verified Application contained undenied statements that Sadlowski's opponent was supported by the union leadership (see 90a, citing Abel Deposition at 5-7, and note 2 above);[9a] that union staff members were instructed to

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[9a] The transcript of the Deposition of I. W. Abel, President of the USWA, Document No. 62B in Civil No. 73-0957B (W.D. Pa), contains the following at 4, 5-7, 9-10, 31-33, 36-37:

"Q. [Mr. Rauh] So that the post of district director of District 31 as the largest is a very important post in your union?

A. [Mr. Abel] *Yes*, under our constitution, the officers have an equal vote with the board member of the largest district. [Emphasis supplied.]

* * * *

[Footnote continued on page 122a]

[9a] [Continued]

Q. Well, there did come a time prior to the February, '73 election when you did decide to support Mr. Evett, did you not?

A. Oh, yes. Maybe, to make it clear, maybe make it so that you won't have to ask a lot of questions, we have, well, since—I was going to say since '65, and that would be a good figure, but pretty much from the beginning of the election of officers of this union, the official family pretty much supports each other, you know, and I think this has been the case up until—well, as an example, when Phil died and I became secretary-treasurer, the Board designated me as the McDonald successor, and then almost without any indications, everybody went out and supportd my candidacy and supported Dave for president.

* * * *

Q. Mr. Abel, would you sort of elaborate on official family? Did you mean the three international officers plus the district directors?

A. District directors.

Q. That would be what you would consider?

A. Right.

* * * *

A. Starting, again, in our campaign in '65, we set up our own little political organization, so to speak. We designated Joe Germano as our chairman, Alex Fuller as our secretary and Tom Murray, who was then with us as assistant to the secretary-treasurer, as the treasurer of our group and this organization was designed to raise funds and direct the campaign.

Q. This would be the campaign of the official family, would that be fair?

A. In '65, yes, . . .

* * * *

A. Yes. Well, then, when we came up this last time, Murray had retired and Germano was retiring and so was Joe Molony, so we made Germano and Molony as co-chairmen. We made Harry Guenther, who succeeded Tom Murray, as the treasurer and Alex Fuller continues to be the secretary of the group.

Now, here again, they engaged the assistance and services of people to run a campaign, and I assume that letter was put together by them, and in this instance sent to the membership in District 31.

[Footnote continued on page 123a]

[9a] [Continued]

When there was a contest in other areas, I suppose a similar letter was sent out. I don't know, but I assume that.

* * * *

A. Well, all that I have had anything to do with is in the way of financial assistance, in line with what we have always done.

* * * *

A. Well, I made a contribution, as an example.

Q. You have made a contribution to Steelworkers for Continued Leadership this year?

A. Right. Right. Yes.

* * * *

Q. That is since the new election—

A. Oh, yes.

Q. —was agreed to?

A. Yes.

Q. And how much was that?

A. Five hundred dollars by personal check.

Q. I think in addition to that you said you had talked about financial assistance for Mr. Evett. How was that to be obtained, other than your check, sir?

A. Well, the normal procedure, and I assume that's the procedure being followed at the present time, while I am not clear that it is, that each director will make a contribution, perhaps some won't, I don't know, but assume they will, and assume that in most cases the directors will talk to their staff people and others about making a contribution, too.

Q. Now, do you know of any place where that has already occurred?

A. Well, I talked to Lynn Williams, our director from District 6 in Canada, who was in the other day, and he told me he was raising some money.

Now, he didn't go into the amount or how. I'm told that various of our directors have talked to their staff. In one case, over in Youngstown, I believe it is, that the director has biven out a copy of a letter that Harry Guenther sent out to the directors, recommending that contributions be made and recommending, I think, in cases of directors a $500 contribution, and in case of staff people, a solicitation of $50, something like that.

* * * *

Q. . . . Would you just tell me if you said the following: Did you say you were supporting Evett?

[Footnote continued on page 124a]

contribute to the Evett campaign in specified amounts[95] and campaigned for Evett on union time and using union facilities, even to the point of neglecting union duties (see 112a); that during the first election union officials refused to inform Sadlowski of the locations of work sites and polling places so that he was limited in placing observers at the polls (see 90a); that Department of Labor investigators found the "very serious violation" of lack of secrecy in the voting at many locals (see 95a); that Sadlowski received widespread reports of ballot frauds, illegal electioneering, deprivation of secret ballot, interference with observers, and other LMRDA

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[95] [Continued]

A. I don't think so, and I wouldn't know that there would be any need for it. They have known that from the last election.

Q. Did you say that Mr. Sadlowski could win and the staff should get out and hustle for Evett?

A. As I say, I don't recall, but I don't listen to myself, as I told you.

I would assume that anybody would say that Sadlowski can win. Any candidate can win, as you and I know from our political experiences.

Q. Well, I'm asking another question. Did you say that, quote, the staff should get out and hustle for Evett?

A. No. I think I said that the staff should assume their responsibility of leadership. I stressed leadership in that meeting that I am aware of, both at the convention as well as the district level, and the importance of seeing to it that their local unions not only participated in the election but did it properly."

[96] The Verified Application contains this language at 112a:

"Harry Guenther, Assistant to the International Secretary-Treasurer, testifying that the official fund-raising arm of the International Union was seeking money for Evett—the 'suggested' amount was $500 per Executive Board member and $50 from each staff representative and 'a further request might be necessary.' The nature of this appeal, communicated to all District Directors is such that at least one Director called a special meeting to distribute copies of the 'suggestion' in envelopes marked 'confidential.'"

violations (see 90a); that the Secretary found basis for a charge in his complaint that moneys received by way of dues, assessments or similar levies were applied to promote the candidacy of Samuel Evett (see 104a, including note 33; *see also* ¶ XIII of Complaint filed on November 8, 1973, by the Secretary as Document No. 1 in Civil Action No. 37-0957 (W.D.Pa.)); and that in Local 1066 the tellers had been found guilty of vote fraud.[10] I. W.

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[10] See pages 17-19 (105a-107a) of the Verified Application for Attorneys' Fees, where this language appears:

"In June, 1974 Intervenor decided to take the depositions of Stanley A. Lichon and Danny Cifalia. At the time of the February 13, 1973 election they were presidents of locals in which the Department of Labor had found considerable evidence of ballot fraud.[34] There were allegations of Evett's staff involvement in both cases. In addition, in the case of Cifalia's local 1066, actions taken by the USWA had created the inference that a cover-up of the involvement of employees of the International Union in massive ballot fraud was in progress. The USWA made strenuous efforts to prevent the questioning of Lichon and Cifalia. The official announcement of the Union's capitulation came during the delayed taking of Lichon's deposition on July 12, 1974 and while Cifalia was still being kept from questioning.

[34] Lichon is the president of local 7610 and was the chief teller in the contested election. In his complaint to the International Tellers Sadlowski had charged fraud in 7610. He had supplied the Tellers with the signed statements of 44 members of that local who said they voted for Sadlowski. In the official tally Sadlowski received 22, Evett was credited with 215.

Cifalia was the president and chief teller of local 1066. Shortly after the contested election he was appointed a staff representative. (He resigned after the local membership found him guilty of vote fraud in the contested election). In that election the official tally was Evett 935, Sadlowski 239. Admissions from the prepetrators of the fraud demonstrated that the names of 600-700 members had been forged and the ballot box stuffed with Evett votes. Lehman Deposition pp. 79-93.

"The membership of local 1066 had imposed fines, including restitution of $3,996.38 for election expense, and sus-

Abel, President of the USWA, testified as follows in a deposition (Document No. 62B in Civil No. 73-0957B (W.D.Pa., at page 38):

> "Q. [Mr. Rauh] And you feel, Mr. Sadlowski shouldn't have gone to the government even though there was ballot box stuffing, Mr. Abel?
>
> "A. [Mr. Abel] Correct, Correct."

The Verified Application also alleges the following at 116a:

> "The USWA has not been a neutral party in these proceedings. Evett was the candidate of the 'official family'—the Administration of the USWA. Abel Deposition, pp. 5-7. During the pre-election conference the views of Evett and the USWA never diverged.
>
> * * * *
>
> "In the 1973 election there were numerous instances of double shipments of ballots and unaccounted-for ballots."

No counter-affidavit was filed by the USWA challenging or contradicting the sworn allegations of the above Verified Application for Attorneys' Fees. The union filed a Motion to Dismiss such application, stating, *inter alia*, at 147a-148a:

> "As a matter of law, the aforementioned Application fails to state a proper claim for attorneys' fees

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pensions, upon Cifalia and four other tellers found guilty of vote fraud.

* * * *

"Thus, by virtue of actions taken by Intervenor's counsel, the USWA Board meeting on July 9, 1974 was faced with a substantiated charge of attempted cover-up of illegal activities and a demand for depositions of two local union presidents who, according to Intervenor's evidence, engaged in unlawful conduct under the prodding of USWA staff representatives, as well as substantiated charges of illegal use of union funds. At that meeting, the board decided to capitulate."

> and therefore should be dismissed on its face. Since such a dismissal would obviate the need for massive discovery and an evidentiary hearing on said Application, USWA respectfully suggests that discovery not be commenced pending disposition of this Motion."

In *Kahan v. Rosenstiel*, 424 F.2d 161, 164 (3d Cir.), *cert. denied sub nom. Glen Alden Corp. v. Kahan*, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970), this court said: "[b]ecause the District Court disposed of the matter on a motion to dismiss, the facts alleged in plaintiff's petition for counsel fees and his amended complaint in the underlying suit must be accepted as true." [10a] It is clear that the USWA was in the best position to deny the above and other allegations of the Verified Application for Attorneys' Fees and the depositions, if they could have done so. USWA elected not to challenge the Verified Application and to file its Motion to Dismiss. This Court has recently reaffirmed the rule applicable to this situation:

> "Under such circumstances, we must take all of the well pleaded allegations of the complaint as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any circumstances, the plaintiff might be entitled to any relief.[4]

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[4] *See, e.g., Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Polite v. Diehl*, 507 F.2d 119, 124 n.2 (3d Cir. 1974); *Quinones v. United States*, 492 F.2d 1269, 1273 (3d Cir. 1974); *Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974); *Melo-Sonics Corp. v. Cropp*, 342 F.2d 856 (3d Cir. 1965."

[10a] *See also*, for example, F.R.Civ.P. 56(e), contemplating that a party must respond to affidavits of his adversary setting forth by affidavits, depositions, etc., "specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Helstoski v. Goldstein, 552 F.2d 564 at page 565 (3d Cir. 1977). In view of the facts in this record, the following language in *Local 639* is particularly applicable:

> "The statute is expressly aimed at protecting union members from the corruption and electoral unresponsiveness of their leadership. 'Fee-shifting' is particularly appropriate because of the close match between the party assessed and the beneficiary of the litigation. Indeed, the benefited class, its contours shaped by the union's self-description and its finances based on per capita payments, fits the paradigm for 'common benefit' cases."

543 F.2d at 383. And we hold that absent congressional circumscription of the court's power to award equitable relief in the form of "fee-shifting," the allowance of attorney's fees is justified under Title IV when a "common benefit" has been conferred.

The overriding considerations in evaluation of "common benefit" claims are: whether the benefits may be traced with some accuracy; whether the class of beneficiaries is readily identifiable; and whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefiting.

The district court, adopting the Magistrate's Report,[11] held that even though the intervenor argued that his actions vindicated the interests of all union members in securing free elections, "it strains belief to conclude that a benefit bestowed upon District 31, whose membership comprises approximately 9% of the entire union membership, inures to the benefit of the steelworkers as a whole." And the Magistrate went on to say that even if the latter proposition were true, "Congress has ascribed the task of insuring the propriety of union elections to the Secretary. The individual may only seek to vindicate his own

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[11] *But see* pages [131a-133a] and note 13 *infra*.

limited personal interest." We have concluded that the district court incorrectly found that no common benefit was conferred upon the USWA as a whole, and improperly denied Sadlowski's application for assessment of attorney's fees against the Union treasury.

The *Hall* Court, after recognizing that Congress enacted the LMRDA to insure minimum standards of democratic process and stem abuses which included breach of trust, corruption, and disregard of the rights of individual employees, stated that by vindicating his own right to free speech under Title I:

> "the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial 'not only in the results achieved but in their implications for the future conduct of the union's affiairs.' *Yablonski v. United Mine Workers of America*, 151 U.S.App. D.C. 253, 466 F.2d 424, 431 (1972). Thus, as in Mills, reimbursement of respondent's attorney's fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefitted from them and that would have to pay them had it brought the suit.'" [Footnote omitted.]

412 U.S. at 8-9, 93 S.Ct. at 1948. *Hall*, then, makes clear that to the extent that prosecution of LMRDA violations supports union democracy, such activity confers direct and substantial benefit upon the entire union membership. In our view, the entire thrust and effect of Sadlowski's prosecution of these Title IV violations was vindication of democratic process in USWA elections, and his actions redounded to the common benefit of the whole Union. Title IV is specifically aimed at remedying interferences with union elections like those which occurred here. In this regard we note the particularly egregious abuses of the electoral process in this case. Sadlowski was not merely opposed by a member of the USWA

"official family," Union officers and agents actively campaigned against him. The depth of Sadlowski's favor with the rank and file of District 31 is evident from the fact that when a fair election was finally held, votes ran nearly two-to-one in his favor. Union leadership having exerted such effort to oppose the candidacy of a single insurgent, it would be naive to assume that similar election "irregularities" have not or would not spread to other districts and locals where a member of the "official family" ran opposed. Had such tactics been successful in District 31, there appears to be little doubt that they would have been employed again, and again. The determination and vigor of this union member served to insure to all union members the rights which Congress intended be theirs, and in this instance union democracy would have been a hollow promise without Sadlowski's involvement. The mere fact that Sadlowski himself benefited from his prosecution of this action neither negates the benefit to the union nor prejudices his right to claim attorney's fees. *Hall, id.*

Sadlowski's contribution to the "common benefit" of the USWA membership is not, however, limited to vindication of union democracy. The directors of the various Union districts serve on the International Executive Board: the USWA's governing body. Interference with the election of the District 31 director cannot be said to have merely localized impact on the union membership. Despite the fact that the main function of a district director is to represent a district, each director also plays a significant role in representing the interests of *every* union member. The International Executive Board is charged with enforcing the Union constitution, directing the affairs of the International, and overseeing the financial affairs of the Union. The International Executive Board also plays an important internal political function, since it decides when elections will be held, and also establishes the territorial boundaries of the various union districts.

The magistrate and the district court were, however, concerned about other elements of the "common benefit" determination as well. The *Alyeska* Court did state that in the Supreme Court's "common-fund and common-benefit decisions, the classes of beneficiaries were small in number." 421 U.S. at 265 n.39, 95 S.Ct. at 1625. The magistrate apparently understood that language to mean absolute numbers, and indicated that a class of 1,400,000 was too large to have been benefited. Like any other statement, that one must be viewed in context. Given this context, mere size does not support the contention that the class of USWA members did not receive a common benefit from Sadlowski's activity. *Mills*, for example, involved a beneficiary class of 8,987, 403 F.2d 429, 432 (7th Cir. 1968). *Hall v. Cole*, *supra*, involved a class of approximately 85,000 union members, and *Yablonski v. United Mine Workers of America*, *supra*, involved a class of approximately 250,000. In our view, the requirement of identifiability weighs heavily in this determination, and USWA members, though numerous, are readily identifiable as the benefited group. The Supreme Court no doubt wished to clarify the notion that although very much larger groups might be said to benefit from the prosecution of certain actions—just as every union member, and every individual might be said to benefit from vindication of union democracy—the doctrine is not to be extended to ludicrous dimensions.

The magistrate also erred in holding that attorney's fees would unfairly burden all Union members since, in its view the primary benefit fell to District 31, while the USWA treasury supported by 1,400,000 members would be the source of payment. This record requires the determination that the entire Union membership benefits from Sadlowski's tenacious handling of this suit, and we note that the benefit conferred in this case may well justify whatever "burden" is involved. But we would point out,

again, that in this case the so-called "burden," and its size, were in large part attributable to the USWA defense of a meritless position. The very purpose of the exhaustion requirement of Title IV is to give the union the opportunity to correct irregularities. Where the union faithfully performs its obligation to obey the LMRDA mandate, neither complainant nor union would require much legal assistance. Here, improper attempts to oppose Sadlowski directly created the need for legal assistance, and the tenacity of this opposition contributed directly to the size of "burden." While we fully agree that, in view of the extreme abuses which occurred, almost all the expenses for legal services incurred by all parties were wasteful and should never have been necessary, there is no reason to penalize the intervenor who performed his function correctly and well. If the rank and file is dissatisfied, their recourse lies with the Union leaders who were responsible. The position that the USWA treasury is an improper fund from which to make an award, since the primary benefit was to District 31, fails for like reasons.[12] While it cannot be denied that the *greatest* benefit was conferred upon Union members in that district, we note that suit was brought against the USWA, rather than District 31, precisely because districts are not labor organizations within the meaning of 29 U.S.C. § 402(i), and the parent union is the suable entity. There is, moreover, no district treasury, since all dues and fees are contributed directly to the USWA and later some funds are dispersed to the districts. To hold that attorney's fees must be recovered from a fund created by those who received the greatest benefit, rather than from a fund created by those who received a legally sufficient and significant benefit, would be tantamount to denial of that recovery. But more than that, such a

[12] The fact that the Secretary of Labor brought suit against the local in *Local 639*, rather than the international, as here, does not suggest that the District of Columbia Circuit would have found differently had suit been brought against the entire union, particularly in view of the union structure in this case, discussed below.

holding would effectively allow unions to insulate themselves from union member attempts to prosecute Title IV violations. By creating an internal structure that comingles funds and denies their identifiability to an individual unit, unions could preclude recovery of attorney's fees. Such action would thwart the process of complaint and productive intervention by union members, and deny effect to the policies enunciated by the LMRDA and *Trbovich*.

We note that although the district court specifically adopted the magistrate's report, the sweeping conclusions of law which are contained in its Memorandum (see note 1 above) appear to differ from the more completely reasoned approach of the magistrate.[13] Our particular con-

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[13] For example, where the magistrate recognized the concept enunciated in *Mills* and *Hall*, that attorneys' fees may be recoverable when a common benefit has been conferred, even though no fund or property is recovered [163a], the district court did not ([157a] and note 1 above); where the magistrate felt that an award based upon the common benefit theory was inappropriate on the facts of this case because of the greater benefit conferred upon District 31 and the burden such fees would place on the union as a whole, the district court found "no support in fact or in law for the grant of counsel fees in a suit brought under the general provisions of Title IV" [155a-156a]; and where the magistrate stated that "[t]he acts of counsel for the intervenor in many respects duplicated the efforts of the Secretary" [172a], the district court held that "any independent investigation which the intervenor might have undertaken was voluntary and self-serving and at the most a mere fraction of and duplicitous of the work entrusted to the Secretary by Congress" [156a]—a statement contrary even to the position taken by the Secretary in his Response . . . to Application for Attorneys' Fees, filed March 7, 1975. *See* Doc.No. 78B in Civil Action No. 73-0957B (W.D.Pa) where the Secretary conceded, at pages 2-3, that:

> "Without attempting to detract from the efforts of counsel for intervenor, it must be pointed out that it is quite customary for the Departments investigators to receive assistance from the complainant in the conduct of their investigation of an election. . . . Indeed it is self-evident that the major part of the leads pursued by the investigators in such an investigation derive from the complainant's allegations."

cern in this case is the failure of the district court to make clear the basis for its decision. Because of the inconsistencies between the report of the magistrate and the Memorandum of the district court, we are unable to determine the extent to which it relied on the reasoning of the United States Magistrate in reaching its decision, as opposed to its reliance on the sweeping legal conclusions quoted in note 1 above. We have concluded that those legal conclusions of the district court are an improper basis for decision on this record.

We believe that a case involving public policy considerations of the great importance of those concerned here requires a reasoned statement by the district court of the exact basis for its determinations on the specific record before it. For example, we do not know whether specific consideration was given by the district court to the serious allegations of fraud in the elective process to which we have referred at [121a-125a], note 10, or whether the hearing judge considered that irrespective of outrageously fraudulent and corrupt elective processes, a defeated candidate for high union office could never recover attorneys' fees solely because District 31 members received more benefit than the general union membership.[14] We reject such a basis for the district court's December 11, 1975 Order.

The second quotation from the district court Memorandum, at note 1, appears to overlook completely the holding of the Supreme Court of the United States in *Mills*, *supra*, that the absence of a "fund or property" does not pre-

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[14] While we do not believe that conferral of a greater benefit upon one particular group prejudices or prohibits an award against a larger benefitted group, the degree of benefit may be relevant to the amount of any award against either. It is conceivable that the benefit to the smaller group would be so greatly disproportionate to the benefit to the larger group that the application of equitable principles would require the assessment of all or the greatest part of the attorneys' fees against the smaller group. However, this record does not seem to present such a situation.

clude the application of the common benefit rationale. See page [119a] above.[15]

The facts of this case illustrate graphically the abuses of power which the LMRDA was enacted to prevent. The Union hierarchy, rather than remaining neutral and maintaining the integrity of the electoral process, closed ranks around its own candidate to prevent an independent contender from gaining a foothold. The vigorous campaign for vindication of congressionally created rights mounted by this intervenor appears to have conferred a "common benefit" upon the USWA as a whole.

In view of our holding that the courts have the power to fashion equitable awards based upon the "common benefit" theory, under Tile IV, the district court order will be reversed and the case remanded for reconsideration. On this question of whether a common benefit was conferred, the district court should carefully consider the unrebutted factual allegations of corruption detailed in the Verified Application, to which we refer above, not only in view of this candidate's successful campaign to vindicate union democracy, and the principles enunciated both in *Local 639* and in this opinion, but particularly in light of the Supreme Court decisions in *Mills* and *Hall v. Cole*.[16]

IV. ON REMAND

It would appear that the discussion of common benefit, to the extent that it existed, in the Memorandum of the district court was dictum, in view of its conclusion that there was no power under Title IV to award attorneys'

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[15] Also we point out that this was not a case involving over a thousand pages of testimony, which could be beneficially summarized in a magistrate's report making reference to the pertinent pages, but one where the record consisted of a single 58-page certified affidavit containing legal argument on many of those 58 pages.

[16] The district court is, of course, free to take further evidence on common benefit and any surrounding circumstances if it concludes that the record is not adequate.

fees. Having held that the award of equitable relief is not precluded by Title IV of the LMRDA, and that the intervenor may be entitled to attorneys' fees based upon a common benefit conferred upon the USWA, the district court order and opinion will be reversed, and the case remanded for findings and reconsideration of the liability of the defendant for attorneys' fees.

Whether an award is warranted and, if so, the amount of such award, is a matter for initial determination by the district court in the light of the broader application of the "common benefit" rationale required by the above cited opinions.

The standards for determining the amount of the award of attorneys' fees have been developed in previous decisions of this Court.[17] The discretion of the district court, aided by the views of the Secretary, will permit reasoned appraisal of the benefits from the legal services performed by intervenor's counsel. However, although union members should not be required to pay for unnecessary duplication of legal services, it should not be presumed that mere duplication of effort by either counsel for Sadlowski or counsel for the Department of Labor was unnecessary or non-beneficial.[18]

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[17] Those decisions include: *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., et al., (Lindy II)*, 540 F.2d 102 (3d Cir. 1976); *Marola v. Atlantic Richfield Co., (Merola II)*, 515 F.2d 165 (3d Cir. 1975); and *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., et al., (Lindy I)*, 487 F.2d 161 (3d Cir. 1973).

[18] *See* page [113a-114a] above. It is clear that some duplication of effort will always occur, since the Secretary must verify information relating to improper union conduct secured and supplied by an intervenor's counsel. Also, time limitations and exhaustion requirements of 29 U.S.C. § 482 and other provisions, may necessitate legal services on behalf of the Secretary as well as such service on behalf of the intervenor. In this case, the decision of the Secretary to terminate the investigation may have justified the continued efforts of counsel for the intervenor to document and preserve evidence of union misconduct. *See* Verified Application for Attorneys' Fees at 103a-104a.

APPENDIX

TITLE IV—ELECTIONS

Terms of Office; Election Procedures

(29 U.S.C. § 481)

Sec. 401 (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often then once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a

labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) In any election required by the section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in

the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constiution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

* * * *

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

* * * *

Enforcement.

(29 U.S.C. § 482)

Section 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization,

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final

judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

Application of Other Laws

(29 U.S.C. § 483)

Sec. 403. . . . The remedy provided by this title for challenging an election already conducted shall be exclusive.

ALDISERT, Circuit Judge, dissenting.

This appeal presents the question whether the entire membership of the United Steelworkers of America should pay private attorney's fees[1] for representation of a candidate in an election dispute over the position of District Director for the USWA district in Illinois and Indiana. Appellant Edward Sadlowski lost the election and, after exhausting his union remedies, filed a complaint with the Secretary of Labor seeking to persuade the Secretary to institute court proceedings to upset the election. After investigating Sadlowski's claims, the Secretary brought an action challenging the election. Sadlowski was permitted to intervene, a settlement was reached, and a new election was held in which Sadlowski won the District Director position, which pays an annual salary of $35,000. The majority holds that the international union treasury should pay Sadlowski's counsel fees incurred in connection with the election dispute. I disagree and would affirm the judgment of the district court.

The majority recognizes that *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L. Ed.2d 141 (1975), which reaffirmed the American Rule respecting the award of attorney's fees, controls this

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[1] Based on a lodestar of 1,279 hours at the rate of $100 per hour for senior counsel and $50 per hour for associates, appendix 139-40, *see Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976), appellee suggests that appellants may be asking for as much as $500,000. Appellee's Brief at 5.

case. But through some very ambitious judicial lawmaking they discover implied authorization in Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 481-483, to depart from that rule. Although Title IV does not provide for private attorney's fees and, indeed, may not be enforced by private action, the Supreme Court has allowed private parties to intervene on a limited basis when an action is brought by the Secretary. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). From this limited, judicial exception to the wholly governmental enforcement scheme of Title IV, the majority concludes that Congress really intended, despite its silence on the point, to allow attorney's fees awards to intervenors in the government proceedings. Having cleared such a high jurisprudential hurdle, the majority has little difficulty negotiating the lesser legal and factual obstacles in its course. It goes further to conclude that Sadlowski's victory in the rerun of the local district election conferred a common benefit on the international union's entire membership throughout the United States and Canada, and that this benefit justifies imposition of attorney's fees under the common benefit exception to the general rule of *Alyeska*. *See Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882). I disagree with both points of the majority's logic.

I.

Title IV of the LMRDA was not enacted in a vacuum; it is one of five titles in a unitary legislative schema. Titles I, II, III, and V rely on private enforcement by individual union members and allow the award at attorney's fees, either expressly or by logical implication from the provision for equitable relief. *See Alyeska, supra; Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed. 2d 702 (1973). Thus, Congress provided that Title I, the bill of rights of union members "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412.

In Title II, relating to reporting, Congress also relied on union members for enforcement and specifically provided: "The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 431(c). In Title III, which concerns union trusteeships, Congress again relied on the individual union members, conferring upon them a civil cause of action "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 464(a). And in Title V, which sets forth fiduciary responsibilities of union officers, Congress not only gave union members a right to sue for damages, accounting or other appropriate relief, but it specified that the trial judge "may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization." 29 U.S.C. § 501(b).

The enforcement provisions of Title IV contrast sharply with those of the other Titles. Title IV does not contemplate private enforcement. Indeed, the right to file suit to enforce Title IV is limited to the Secretary, 29 U.S.C. § 482(b), and this remedy is declared to be exclusive. 29 U.S.C. § 483. There is no express or implied provision for attorney's fees for private enforcement of Title IV because no private enforcement is contemplated or allowed. *Trbovich v. United Mine Workers of America*, *supra*, 404 U.S. at 532, 92 S.Ct. at 633, tersely stated the reasons for the special and limited enforcement provisions of Title IV:

> A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single

election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones, and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court. The alternative proposals were rejected simply because they failed to accomplish these objectives.

As the Supreme Court noted in *Trbovich*, Congress rejected a provision which would have allowed individual union members to bring actions to enforce Title IV. 404 U.S. at 532-36, 92 S.Ct. 630. In Title IV litigation "the Secretary of Labor in effect becomes the union member's lawyer." *Ibid.* at 539, 92 S.Ct. at 636 (quoting Senator Kennedy). I do not read the statute or its legislative history as contrary to the limited right of private intervention which *Trbovich* established. But where Congress definitely rejected private litigation as a means of enforcing Title IV, it is difficult for me to grasp how Congress, at the same time, could have intended that courts award attorney's fees to private counsel in connection with Title IV litigation.

Holmes said that "judges do and must legislate, but they can do so only interstitially; there are confined from molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (1917). In this case, I find the majority's motion to be molar. They leap from artful statutory language that excludes private enforcement, to the circumscribed right of intervention which *Trbovich* allows "so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint." 404 U.S. at 537, 92 S.Ct. at 636. Without getting a purchase on the narrow rationale of *Trbovich*, they then vault into the jurisprudential stratosphere to conclude that Congress intended that private attorney's fees would be awarded in connection with litigation that Congress ordered to be carried out exclusively by the Secretary of Labor.

I have set forth my views on the legitimacy and necessity for judicial lawmaking elsewhere.[2] And I am quick to recognize that the precise boundaries of judicial lawmaking are often difficult to ascertain. But "[w]hen a cause of action has been created by statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Fleischmann Corp. v. Maier Brewing*, 386 U.S. 714, 720, 87 S.Ct. 1404, 1408, 18 L.Ed.2d 475 (1967). *A fortiori*, an authorization of attorney's fees for activity outside the remedial scheme of the statute should not readily be implied. This is particularly true in view of *Alyeska's* recent, vigorous reaffirmation of the vitality of the American Rule:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. We are asked to fashion a far-reaching exception to this "American rule"; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

421 U.S. at 247, 95 S.Ct. at 1616.

The majority has done what the Supreme Court refused to do in *Alyeska*: they have fashioned a far-reaching exception to the American Rule. Whatever precepts of statutory construction I apply— the Mischief Rule, the Golden Rule, the Literal Rule, the Plain Meaning Rule, or interpretations based on the legislative history—I cannot interpret Title IV as allowing such a

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[2] *See* R. Aldisert, The Judicial Process 1-3 (1976); Aldisert, *An American View of the Judicial Function* in Legal Institutions Today: English and American Approaches Compared 43 (Harry W. Jones, ed., 1977).

result. The majority's reading, in my view, is reminiscent of *dicto simpliciter*, the fallacy of accident. It has not misapplied the general rule to an exceptional case, but has misapplied a limited exception to that which fits the general rule. The exception begins to take on the potency of the general rule. I am as unwilling to engage in such an inversion of the law as I am disinclined to join in the majority's adventure into the legislative cosmos.

II

My resolution of the threshold statutory issue is sufficient to affirm the district court. In addition, however, I do not agree with the majority's second theory—that the consensual agreement to a new election for District Director in Illinois and Indiana conferred a common benefit upon the entire membership of the United Steelworkers of America.

No court made findings as to the conduct of the first election.[3] Indeed, no court ordered a new election in Sadlowski's district. Not only were the allegations regarding the first election unlitigated, but the settlement agreement approved by the district court prior to the second election contained a disclaimer of any concession by the parties as to the truth of the allegations. Nevertheless, the majority makes three interesting statements, each of which takes sustenance from the unlitigated allegations, and upon which the majority postulate their common benefit theory:

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[3] In *Usery v. Local Union No. 639*, 543 F.2d 369) D.C.Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1159, 51 L.Ed.2d 573 (1977), there was an adjudicated violation upon which the rerun election was predicated. *See* 543 F.2d at 384 n. 39. That, in tandem with the fact that the *Usery* action was brought against a local rather than the international union, distinguishes that case from this one. It does not, however, necessarily bring my view into line with the District of Columbia Circuit's. While there might arguably be a sounder basis for equitable relief in the case of an adjudicated violation, Title IV, in my view, still would preclude a fee award.

(1) In our view, the entire thrust and effect of Sadlowski's prosecution of these Title IV violations was vindication of democratic process in USWA elections, and his actions redounded to the common benefit of the whole Union.

(2) [W]e note that particularly egregious abuses of the electoral process in this case. Sadlowski was not merely opposed by a member of the USWA "official family," Union officers and agents actively campaigned against him.

(3) Union leadership having exerted such effort to oppose the candidacy of a single insurgent, it would be naive to assume that similar election "irregularities" have not or would not spread to other districts and locals where a member of the "official family" ran opposed. Had such tactics been successful in District 31, there appears to be little doubt that they would have been employed again, and again. The determination and vigor of this union member served to insure to all union members the rights which Congress intended to be theirs, and in this instance union democracy would have been a hollow promise without Sadlowski's involvement.

Majority Opinion at [129a-130a].

Although such rhetoric is usually associated with partisan politics, these are not excerpts from political campaign literature. These are statements from an opinion of this court. But they do not derive from the findings of any trial court. They are conclusions drawn by the majority on the basis of certain averments set forth in an application for attorneys' fees. The defendants were not required to challenge or contest the *factual* averments, because they were successful in a *legal* defense that, even if the alleged facts were true, no attorneys' fees were awardable as a matter of law. The federal practice that permits a challenge to the legal sufficiency of a claim tracks the common law demurrer, and admits,

for the purpose of argument only, properly averred historical or narrative facts. That such facts are assumed for the purpose of testing a legal issue does not permit a court to draw from them, as did the majority, additional non-factual conclusions, e. g., "vindication of democratic process in USWA elections", "the particularly egregious abuses of the electoral process in this case", and "union democracy would have been a hollow promise without Sadlowski's involvement". As a member of this court, I am constrained to specifically disassociate myself from this extravagant language and from any resulting inferences which tend to impugn the integrity of the International President and members of the Executive Board of the Steelworkers' Union.

The particulars from which the majority's universals are drawn seem centered around two factual complexes: (1) tellers of *Local 1066* had been guilty of vote fraud, see Majority Opinion at [121a-126a]; and (2) Sadlowski's opponent Samuel Evett, was supported by the international union's "official family," *see* Majority Opinion at [96a]. I find the sweeping conclusions drawn from these instances to be striking examples of the fallacy of composition and the fallacy of *post hoc ergo propter hoc*. To conclude that, because *local* tellers ran a fraudulent election the *international* union was responsible, is the fallacious error of reasoning that what is true of part is necessarily true of the whole. To conclude that because international officers supported Sadlowski's opponent in a fraudulent election, the international was therefore responsible for the fraud, is the classic *post hoc* fallacy. The mere chronological sequence of events does not establish a causal connection.

Nevertheless, from this fragile foundation the majority hops to another facet of the same argument, contending that benefits accuring from a consensual agreement to conduct a second election could be traced with accuracy to a class of beneficiaries constituting the entire member-

ship of the international union. Apparently referencing the prescriptions of *Alyeska*, the majority states that '[t]he overriding considerations in evaluation of 'common benefit' claims are: whether the benefits may be traced with some accuracy; whether the class of beneficiaries is readily identifiable; and whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefiting." Majority Opinion at [128a]. I prefer the *Alyeska* Court's exact formulation: "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting.' 421 U.S. at 265 n.39, 95 S.Ct. at 1625. Guided by this precise language, rather than the majority's paraphase, I conclude:

(1) The 1,300,000 members of the United Steelworkers are not "small in number and easily identifiable."

(2) The benefits "can [not] be traced with some accuracy," other than to Sadlowski, who attained the position of District Director as a result of his efforts, and to the 300,000 members of District 31, the only USWA members directly involved in the election.

(3) Detailed studies invoking political science, labor relations, and economics would be necessary to detect the benefit to the average USWA member as a result of the rerun election in the Illinois-Indiana District. And, in any event, to shift the costs "with some exactitude" would require that Sadlowski and the members of his district pay a significantly greater portion of the fee than the average union member who, if he benefits at all, benefits less than the members of the specific district involved.

In reviewing the accomplishments of appellant's able counsel, I have nothing but the highest praise for the excellence of their services. I quarrel only as to who should pay for those services. I believe that Title IV precludes an award of attorney's fees in this case, and even if it does not, I believe that this is not an appropriate case for an equitable award under the common benefit theory. I would affirm the judgment of the district court.

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Third Circuit

May 26, 1977

No. 76-1169

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor

EDWARD SADLOWSKI,
Intervenor plaintiff

ANTHONY TOMKO,
Intervenor plaintiff

v.

UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC
(District 15) (District 31)

EDWARD SADLOWSKI, intervenor above named, and the following counsel for SADLOWSKI: JOSEPH L. RAUH, JR.; LEON DESPRES; KENNETH J. YABLONSKI; and JUDITH SCHNEIDER,

Appellants

(D.C. Civil No. 73-957)

Present: ALDISERT and VAN DUSEN, *Circuit Judges* and BROTMAN, *District Judge*.

1. Motion by appellee for leave to file a petition for rehearing in excess of 15 pages, to and including 21 pages, in the above-entitled case. The opinion was filed and the judgment entered on April 20, 1977. A copy of ap-

pellee's petition for rehearing, received today, is enclosed for your information.

Respectfully,

Clerk

enc.
ags

The foregoing Motion is denied. Appellee is granted ten (10) days within which to file a petition for rehearing in accordance with Rule 40(a), F.R.A.P.[1]

By the Court,
VAN DUSEN, *Judge*

Dated: June ?, 1977

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[1] Those joining in the majority opinion note the use of at least four pages (paragraphs 3 on pages ii and 2, the last paragraph on page 2, and parts III and IV on pages 18-21) to characterize the majority opinion, which makes clear at pages 3-4 that the court is

> ". . . not passing on the truth of the statements in the record or on the character of the intervening plaintiffs, as opposed to that of the high-ranking officers of the union, but we are required, under the posture of the case as it existed at the time of the district court order from which the appeal was taken, to take all well-pleaded allegations in the record as true for purposes of this appeal and to construe them in the light most favorable to the plaintiffs (see page 31). These record facts are important in the determination of whether the district court was justified in rejecting the application for attorneys' fees as a matter of law, rather than making its decision as a matter of discretion in the light of the record facts before it."

That opinion remanded the case solely for reconsideration in the light of the controlling authorities on statutory preclusion and "common benefit." At page 7, this language appears:

> ". . . we have concluded that the district court had the right, in its discretion, to award attorneys' fees on the record in this case. We hold that the district court did not have the power to

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reject the claim for attorneys' fees on the basis of the legal conclusions stated in note 1 above, which we reject."

Defendant-appellee will clearly be entitled to a hearing if the Motion to Dismiss the application for attorneys' fees is denied, and there is nothing in such opinion holding to the contrary. In addition to the hearing on the application which will be available to defendant-appellee if the Motion to Dismiss is denied, the opinion also grants the district court power "to take further evidence on the common benefits and any surrounding circumstances if it concludes that the record is not adequate," since the court may decide, after hearing the views of counsel, to supplement the record without a full hearing on the allegations concerning attorneys' fees.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action No. 73-957

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff

v.

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC (District 31),
Defendant

EDWARD SADLOWSKI,
Intervenor

MEMORANDUM

ROSENBERG, *District Judge*

On November 8, 1973, counsel for the plaintiff, Peter J. Brennan, Secretary of Labor, United States Department of Labor, commenced this civil action challenging the February 13, 1973 election for director of District 31 AFL-CIO-CLC. On January 18, 1973, Edward Sadlowski was permitted to intervene as a party plaintiff for the purpose of safeguarding his own personal interest in the outcome of the District 31 election in which he had been an unsuccessful candidate. *Trbovich* v. *Mineworkers*, 404 U.S. 528 (1972).

Following wide and extensive pretrial proceedings by counsel for the Secretary and counsel for the defendant, a proposed settlement was submitted to the court for ap-

proval. With some modification, this agreement was approved on August 23, 1974. It directed that a new election for district director be conducted on November 19, 1974. Following this election the proper certification was filed by the plaintiff in which the intervenor was certified as the duly elected director of District 31, and an order and decree based upon the certification was entered on December 2, 1974.

On January 31, 1975, counsel for the intervenor submitted a "Verified Application for Attorneys' Fees" and submitted a memorandum in support thereof. By order dated March 13, 1975, this application was referred to a United States Magistrate for report and recommendation. After briefing and argument, the magistrate submitted a report and recommendation on July 22, 1975 that the application for fees be denied. Subsequently, counsel for the intervenor filed exceptions to the Magistrate's report and recommendation and the matter was set for hearing.

At the hearing held on November 19, 1975, counsel for the intervenor was granted broad leeway in presenting all possible contentions and objections. Counsel for the defendant likewise made a vigorous argument in support of the Magistrate's determination. Counsel for the plaintiff made a limited presentation which, in essence, emphasized that the Secretary of Labor was the appropriate representative of all interested parties and that counsel for the intervenor merely functioned in a very limited capacity to protect the rights of the intervenor himself.

I have thoroughly reviewed the application for attorneys' fees, the report and recommendation of the magistrate, the exceptions filed thereto, and the arguments presented before me. After a thorough review and analysis of the entire record, hearings and arguments before me, I find no support in fact or in law for the grant of counsel fees in a suit brought under the general pro-

visions of Title IV of the L.M.R.D.A., 29 U.S.C. §§ 481-483.

Congress mandated in 29 U.S.C. § 482(b) that the Secretary of Labor be vested with exclusive authority to review all post-election complaints and take such action as the Secretary deems necessary to vindicate the rights of all union members. This remedy is the exclusive remedy. *Dunlop v. Bachowski*, 421 U.S. 560 (1975) and it is only for the limited purpose of safeguarding an individual member's own rights that he may be permitted to intervene. *Trbovich* v. *Mineworkers*, *supra*.

In his response to the application for fees, and again at oral argument before me, counsel for the Secretary reminded me of the large number of man-hours which the plaintiff had expended not only here but also in Chicago in order to assure that the rights of the union members were protected. It is to the Secretary's credit that irregularities in the union election were corrected. While it cannot be denied that the intervenor's complaint to the Secretary triggered the events which followed thereafter, any independent investigation which the intervenor might have undertaken was voluntary and self-serving and at the most a mere fraction of and duplicitious of the work entrusted to the Secretary by the Congress. As such, it would be gratuitous.

From a reading of the statute Congress did not intend that individuals become private attorneys general. To permit such procedures would invite every potentially aggrieved union member to retain private counsel and duplicate or imitate the functions of the Secretary with expectations that unlimited fees would become the burden of all the union members. This was not the intent of Congress in vesting this authority in the Secretary.

> ". . . '. . . Congress made suit by the Secretary the exclusive post-election remedy for two principal rea-

> sons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as may be warranted. . . .' . . ." *Dunlop* v. *Bachowski, supra*, at page 569.

Furthermore, the Supreme Court has definitely mandated that:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 26 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance for attorneys' fees . . ." *Alyeska Pipeline Service* v. *Wilderness Society*, 421 U.S. 240 (1975), at page 269.

The Court of Appeals for this Circuit has made clear that the limitations imposed by *Alyeska* mandate ". . . that the American rule that each party should bear his own costs controls, except in certain limited situations." *Securities and Exchange Commission* v. *Aberdeen Securities Co., Inc.*, —— F.2d ——, C.A. 3, No. 75-1074 filed November 13, 1975, Slip Opinion, at page 7. The exceptions recognized by the Third Circuit are (1) a contract or statute granting a right to attorneys' fees; (2) the conferring of a common benefit for the recovery of a fund or property; (3) willful disobedience of a court order; or (4) a finding that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Counsel for the intervenor has failed to demonstrate the existence of any of these or that there is a basis in law or a recognized exception to the general American rule which recognizes an award of attorneys' fees. Accordingly, the exceptions to the Magistrate's Report and Recommendation submitted by counsel for the intervenor

will be overruled, and the Report and Recommendation will be adopted as the opinion of this court.

An appropriate order will be entered.

ORDER OF COURT

AND NOW, TO-WIT, this 11th day of December 1975, for the reasons set forth in the foregoing Memorandum, the exceptions to the Magistrate's Report and Recommendation as filed by counsel for the intervenor is hereby overruled; and the Report and Recommendation of the Magistrate is hereby adopted as the opinion of this court.

R. ROSENBERG
United States District Judge

cc:
Counsel of Record

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action No. 73-957

PETER J. BRENNAN, *Secretary of Labor*,
United States Department of Labor,
Plaintiff

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC (District 31),
Defendant

EDWARD SADLOWSKI,
Intervenor

MAGISTRATE'S REPORT AND RECOMMENDATION

I. *Recommendation*

It is respectfully recommended that the "Verified Application for Attorneys' Fees" submitted by counsel for the intervenor be denied.

II. *Report*

Presently before the Court for disposition is a "Verified Application for Attorneys' Fees" filed by counsel for the intervenor.

On February 23, 1973, Edward Sadlowski wrote a letter to the Secretary of Labor ("the Secretary") protesting the February 13, 1973 election for Director of District 31, United Steelworkers of America. Specifically, Sadlowski alleged that the Steelworkers failed to provide

adequate safeguards to assure a fair election in District 31.

Following investigation, on November 8, 1973, the Secretary commenced this civil action challenging the election and seeking, *inter alia*, to have the February 13, 1973 election declared null and void, and an order directing that a new election be conducted. On December 21, 1973, Sadlowski was permitted to intervene as a party plaintiff. *Trbovich* v. *Mine Workers*, 404 U.S. 528 (1972).[1]

Extensive pretrial discovery was conducted, and on August 2, 1974, a proposed settlement agreement was submitted to the court for approval. That agreement provided that a new election for the office of Director of District 31 be held on or before November 29, 1974, said election to be conducted under the supervision of the Secretary, in accordance with Title IV of the LMRDA (29 U.S.C. § 481, *et seq.*).

The settlement agreement was approved by the court on August 23, 1974, with the added provision that the election be conducted on or before November 19, 1974.[2] The court retained jurisdiction over the action until the

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[1] In *Trbovich*, the Court approved the intervention by an individual in an already pending suit. The Court held that this procedure does not denigrate from the original Congressional intent of making suits by the Secretary the exclusive post-election remedy. "(1) to protect unions from frivolous litigated and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election." 404 U.S. at 532. Specifically, the Court found that "intervention by union members in a pending enforcement suit, unlike initiation of a separate suit, subjects the union to relatively little additional burden." 404 U.S. at 536.

[2] Counsel for the intervenor claim that this change in election date resulted from the intervenor's efforts to have the election conducted prior to the Thanksgiving vacation, thereby insuring a more equitable result.

results of the election were certified by the Secretary and an appropriate final decree entered.

On November 29, 1974, a certificate of election was filed by the Secretary, certifying that the intervenor had been elected Director of District 31. In an Order and Decree dated December 2, 1974, it was adjudicated that Edward Sadlowski was the duly elected Director of District 31.

On January 31, 1975, Joseph L. Rauh, Jr., Leon Despres, Kenneth J. Yablonski and Judith Schneider, counsel for intervenor-Sadlowski, filed the instant application for counsel fees.

In support of this application an extensive memorandum has been submitted which states that:

> ". . . throughout the period of information-gathering, the Union administrative proceedings required to invoke the Labor Department jurisdiction; throughout the proceedings in that Department and before the Court, leading to the Order of a new election; and throughout the period of efforts to assure that the new election would be free of the fraud and corruption of the earlier vote, intervenor's counsel played a crucial role in assuring and vindicating union democracy. A testimonial to the quality and effectiveness of counsel's efforts is the outcome of the re-run election compared with the outcome of the original vote."

For these efforts counsel for the intervenor seek fees which have been estimated by the defendant to be as high as one-half million dollars.

Where a court in the exercise of its discretionary function, or in enforcing specific statutory authorization or contractual agreements, awards attorneys' fees, certain guidelines have been established. In *Lindy Bros. Bldrs. Inc. of Phila.* v. *American R. & S. San. Corp.*, 487 F.2d

161 (3d Cir. 1973), the Court set forth guidelines to be employed to assure compensation to counsel for the reasonable value of his services. The first determination to be made is to accurately ascertain the amount of time devoted to the case. Secondly, the court must attempt to place a value on those services to the class as a whole and then attempt to determine the value of those services which inured to the unrepresented class' benefit. Thirdly, an effort must be made to ascertain the reasonable or normal value of the attorneys' services in view of his professional reputation and status. This figure is then adjusted to reflect the contingent nature of success, and the quality of the work performed in view of the complexity and novelty of the issues. The amount thus arrived at must then be apportioned amongst the beneficiaries of the action. These standards were reaffirmed in *Estein* v. *Christian*, 507 F.2d 61, 63 (3d Cir. 1975). In order to arrive at such fees, the court in *Lindy*, 487 F.2d at 169, emphasized the necessity for an evidentiary hearing to provide the factual basis for assessing the various criteria set forth above.

In the present case, the parties have agreed that extensive discovery would be required before an evidentiary hearing could be conducted to determine the amount of an award, if any. For this reason, counsel have consented to stay all discovery pending a resolution of the legal basis upon which fees may be granted or denied. Accordingly, the matter presently before the Court is restricted to a determination of whether or not there exists a basis in law or in equity for the award of counsel fees. If this issue is resolved in favor of the petitioners, extensive discovery must follow. However, if this issue is determined adverse to the petitioners, then no further action is necessary.

By order dated March 13, 1975, this matter was referred to the undersigned United States Magistrate for report and recommendation. Extensive briefing was con-

ducted by all parties, and argument held on the limited issue of whether or not attorneys' fees are recoverable under Title IV of the LMRDA.

In *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 43 L.W. 4561 (No. 73-1977 filed May 12, 1975), the Court reviewed the 'American Rule' that the prevailing party may not recover attorneys' fees as costs or otherwise.[3] See also: *United States Steel Corporation* v. *United States*, F.2d (3d Cir. No. 74-2183, filed June 16, 1975). After reviewing considerable historical background, the Court in *Alyeska* reiterated the proposition that absent specific authorization, either statutory or contractual, litigants must assume their own counsel fees.[4] However, the Court also recognized:

> ". . . the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." 43 L.W. at 4567.[5]

Certain other exceptions to the "American Rule" have gained acceptance. Counsel fees may be awarded where the efforts of a litigant confers a "substantial benefit" on an ascertainable class. *Hall* v. *Cole*, 412 U.S. 1 (1973), *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Another recognized exception is that "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly,

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[3] The Court of Appeals for the District of Columbia (495 F.2d 1026) had awarded fees to the respondent against the petitioner, holding that the respondent acting as a private attorney-general, had acted to vindicate the rights of all citizens. The Supreme Court reversed.

[4] See: *Hall* v. *Cole*, 412 U.S. 1 (1973).

[5] See: *Hall* v. *Cole*, *supra*.

or for offensive reasons." *F. D. Rich Co., Inc.* v. *Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974). Also recognized as an exception to the general rule is the situation where a party has acted as a "private attorney general" in vindicating a strong public interest and conferring widespread public benefit. *Bradley* v. *School Board*, 416 U.S. 696 (1974).

While cognizant of these exceptions, the Court in *Alyeska* emphasized that upon the general exclusionary "American Rule" Congress has elected to create certain statutory exceptions thereby creating explicit provisions for the allowance of counsel fees.[6] In other cases, the Court stated:

> ". . . Congressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.
>
> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees some but not others. But it would be difficult, indeed, for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." 43 L.W. at 4568-69.

Accordingly, the Court concluded:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a

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[6] For a detailed listing of some of these statutory exceptions see *Alyeska Pipeline Service* v. *Wilderness Society*, *supra*, footnote 33, 43 L. W. at 4568.

> general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases, but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." 43 L.W. at 4570.

Thus, the Court concluded that it was inappropriate to judicially reallocate the burden of litigation, without specific Congressional guidelines. Furthermore, in *United States Steel Corporation* v. *United States*, *supra*, the Court of Appeals for this Circuit observed that *Alyeska* has provided ". . . a trenchant statement that the Supreme Court is not inclined at the present time to enlarge the traditional scope of attorney fee awards." (Slip Opinion, p. 8).

We now turn specifically to the issue of the propriety of awarding counsel fees pursuant to the various sections of LMRDA.

Title I of the Act, 29 U.S.C. §§ 411-415 creates a bill of rights for union members. In enforcing these rights, an individual is permitted to bring a civil action in a United States District Court "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412. This has been held to include awarding attorneys' fees. *Hall* v. *Cole*, *supra*.

Title II of the Act contains the reporting provisions, 29 U.S.C. § 431-440, and contains specific authorization for the allowance of attorneys' fees. 29 U.S.C. § 431(c).

Title III of the Act, 29 U.S.C. § 461-466 concerns trusteeships, and provides in 29 U.S.C. § 464(a) for suit brought in a United States district court, by a union

member for "such relief (including injunctions) as may be appropriate."

Title V of the Act, U.S.C. §§ 501-504 concerns the fiduciary responsibility of union officers, and provides that a union member may bring suit in a United States District Court for appropriate relief including attorneys' fees. 29 U.S.C. § 501(b).

Thus, in those instances where fees are allowed, Congress has recognized the rights of an individual member to bring suit to vindicate the general rights of all other members.

However, the present action arises under Title IV of the Act, 29 U.S.C. § 481-483, which concerns union elections. Specific means are provided in 29 U.S.C. § 482 to challenge the validity of a union election. It is provided that after exhausting internal remedies, a union member may file a complaint with the Secretary. 29 U.S.C. § 482(a). It is then directed in Section 401(b) of the Act, 29 U.S.C. Section 482(b) that:

> "The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

In interpreting this function, the Court stated in *Dunlop* v. *Bachowski*, 43 L.W. 4669, 4671-4672, (No. 74-466 filed June 2, 1975) that:

> "Congress 'decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest . . . [and] decided not to permit individuals to block or delay union elections by filing federal-court suits. . . .' *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964). Congress' concern was to settle as quickly as practicable the cloud on the incumbent's title to office,' *Wirtz* v. *Glass Bottle Blowers*, [389 U.S. 463 (1968)] 389 U.S. at 468 n.7, and in 'deliberately [giving] exclusive enforcement authority to the Secretary . . . emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member. . . .' *id.*, 473-475. '. . . it is most improbable that Congress deliberately settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers to discharge his responsibilities, yet intended the shape of the enforcement action to be immutably fixed by the artfulness of a layman's complaint. . . . The expertise and resources of the Labor Department were surely meant to have a broader play. . . .' *Wirtz* v. *Laborers' Union*, 389 U.S. 477, 482-483 (1968). '. . . Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted. . . .' *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 532 (1972). '. . . Congress intended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary." *Id.*, at 536. '. . . The

> statute gives the individual union members certain rights against their union and 'the Secretary of Labor in effect becomes the union member's lawyer' for purposes of enforcing those rights. . . .' *Id.*, 538-539."

Thus, in *Bachowski*, the Court held that while the Secretary had the exclusive right to determine whether or not to bring suit to challenge an election, as counsel for the union members, the Secretary must provide a complaining member with reasons supporting a determination not to bring suit. 43 L.W. at 4673. Once these reasons are stated, the scope of judicial review of the Secretary's decision is very narrowly circumscribed. 43 L.W. at 4671. The Court in *Bachowski* concluded that this review:

> ". . . should be confined to examination of the reasons statement and the determination whether the statement without more evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious." 43 L.W. at 4673.

Thus, it was determined that the clear intent of Congress was to cloak the Secretary with the mantle of counsel for all union members in an attempt to challenge an election pursuant to Title IV, LMRDA. However, it was also recognized that at times the interests of an individual member do not always completely coincide with the interests of the union as a whole. Within this narrow confine an individual member is permitted to pursue his own interest. *Trbovich* v. *Mine Workers, supra.*

Counsel for the intervenor here, seek an award under the "common benefit" doctrine, *i.e.*, the spreading of the cost to those persons deriving benefits from their action. *Mills* v. *Electric Auto-Lite, supra*, 396 U.S. at 393-394.[7]

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[7] In *Hall* v. *Cole, supra*, f.n. 7, the Court stated:

"This exception has its origins in the 'common-fund' cases, which have traditionally awarded attorneys' fees to the successful plaintiff

While the Court in *Alyeska* approved the common benefit concept, it cautioned that the costs be spread amongst the beneficiaries of the litigation. 43 L.W. at 4563. In *Hall* v. *Cole*, *supra*, the Court concluded that an award against the union treasury was appropriate since *all* members had benefited from the litigation. 412 U.S. at 8-9. However, in *Hall* v. *Cole*, the Court noted parenthetically that a valid consideration in awarding fees is:

> ". . . the extent to which the payment of the plaintiff's counsel fees out of the union treasury might

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when his representative action creates or traces a 'common-fund,' the economic benefit of which is shared by all members of the class. See *e.g.*, *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885); *Trustees* v. *Greenough*, 105 U.S. 527 (1882). In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), the rationale of these cases was extended to authorize an award of attorneys' fees to a successful plaintiff who, although suing on her own behalf rather than as representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of *stare decisis*. In reaching this result, the Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually would recover. Finally, in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), we held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation '"which corrects or prevents an abuse which would be prejudicial to the rights and interest"' of those others. *Id.*, at 396, quoting *Bosch* v. *Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 366-367, 101 N.W. 2d 423, 427 (1960).

"Citing our decisions in *Mills*, *supra*, and *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), respondent contends that the award of attorneys' fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a '"private attorney," vindicating, a policy that Congress considered of the highest priority.' *Id.*, at 402. See also *Knight* v. *Auciello*, 453 F.2d 852 (CA 1 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (CA 5 1971). In light of our conclusion with respect to the 'common benefit' rationale, however, we have no occasion to consider that question."

> impair the union's ability to operate effectively . . . . Here, the petitioners do not, and indeed cannot, contend that the award of only $5,500 would in any sense jeopardize union stability." 412 U.S. at 15, f.n. 23.

In applying the common-fund theory, the Court in *Alyeska*, 43 L.W. at 4569 f.n. 39 observed:

> "In this Court's common fund and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs."

District 31 covers a geographic area including part of Northeastern Illinois and Northwestern Indiana. Its membership consists of approximately 126,000 persons. The defendant, United Steelworkers of America, has approximately 1,400,000 members. Because the individual districts are not labor organizations within the meaning of 29 U.S.C. § 402(i), suit was brought against the national union as an entity. (See stipulation filed January 21, 1974, and to which counsel for the intervenor expressed no objection despite an opportunity to do so).

In enacting LMRDA, "it is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order to best serve the public interests . . ." *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

In his response to the application for attorneys' fees, the Secretary states:

> "Without attempting to detract from the efforts of counsel for intervenor, it must be pointed out that it

is quite customary for the Department's investigators to receive assistance from the complainant in the conduct of their investigation of an election, even when the complainant is not represented by an attorney. Indeed it is self-evident that the major part of the leads pursued by the investigators in such an investigation derive from the complainant's allegations. However, the Department pursues its own investigation to obtain evidence which may or may not substantiate those allegations. In this case, the Department spent approximately 3,600 man hours in the investigation of Sadlowski's complaint.

"After the filing of the suit, the government's attorneys promptly instituted discovery and moved for expedition of the proceedings. The government was prepared to proceed to trial without the additional evidence sought by counsel for intervenor through his depositions. The Stipulation of Settlement was negotiated by the government and approved in accordance with the agreement of the principal parties.

"The supervision of the election was the responsibility of the Department of Labor. The Department utilized the expertise gained through the supervision of hundreds of elections during the fifteen years of the Act's existence. The Department expended approximately 25,000 man hours in connection with its supervisory role.

"In short, the Department of Labor has conscientiously fulfilled its responsibilities with respect to the investigation of Sadlowski's complaint, the successful prosecution of the litigation, and the supervision of the ensuing election in such a manner as to insure the free operation of the democratic process."

In performing such a function the Secretary was following the mandate of Congress in Title IV that he serve

as counsel for the union membership as an entity. The only exception to such a role in a Title IV suit is the allowance of intervention by a person who believes that the Secretary's actions will not adequately protect his own limited interests. *Trbovich* v. *Mine Workers, supra.* Intervention, in such circumstances is authorized because such action foists relatively little additional burden on the union. *Trbovich* v. *Mine Workers, supra.*

Accordingly, the extensive program undertaken by the intervenor to invalidate the earlier election, and secure his own election was purely a matter of very limited interest. Although counsel for the intervenor argues that their action vindicates the interests of all union members in securing free elections, it strains belief to conclude that a benefit bestowed upon District 31, whose membership comprises approximately 9% of the entire union membership, inures to the benefit of the steelworkers as a whole.

Furthermore, even if this latter proposition were true, Congress has ascribed the task of insuring the propriety of union elections to the Secretary. The individual may only seek to vindicate his own limited personal interest.

The acts of counsel for the intervenor in many respects duplicated the efforts of the Secretary.

In *Alyeska*, 43 L.W. at 4569, f.n. 39, the Court repeated that its common-benefit awards involved a small readily identifiable class of beneficiaries whose benefits could be accurately traced. In addition, the shifting of costs could be done with exactitude, and without sophisticated economic analysis. Accordingly, an assessment of fees against the defendant union does not assess a small, readily identifiable class of beneficiaries. Rather, it taxes all union members, whose benefits, if any, are extremely vague and indirect.

In addition, allowing fees directly contravenes the goal of Congress in appointing the Secretary as counsel for all

members, and utilizing his resources and expertise for the benefit of all concerned.

Furthermore, any award of fees would impose an enormous burden on the defendant. This clearly would not be in accord with the Court's observation in *Hall* v. *Cole*, 412 U.S. at 15 that the fees awarded would only be minimal in nature. Nor would such an award fall within the category of "relatively little additional burden" justifying intervention. *Trbovich* v. *Mine Workers*, 404 U.S. at 536.

The observation of the Court in *Alyeska*, 43 L.W. at 4570-71, warrants repeating again:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorney's fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees . . .
>
> ". . . the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs . . ." 43 L.W. at 4570-71.

Accordingly, it is respectfully recommended that the "Verified Application for Attorneys' Fees" submitted by counsel for the intervenor be denied.

Respectfully submitted,

/s/ Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1032

RAY MARSHALL, Secretary of Labor,
United States Dept. of Labor,
EDWARD SADLOWSKI,
Intervenor Plf.

ANTHONY TOMKO,
Intervenor Plf.

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
(District 15) (District 31)

EDWARD SADLOWSKI, Intervenor above named, and the following counsel for SADLOWSKI: JOSEPH L. RAUH, JR., LEON DESPRES, KENNETH J. YABLONSKI and JUDITH SCHNEIDER,
Appellants

(D.C. Civil No. 73-0957)

On Appeal from the United States District Court
For the Western District of Pennsylvania

Present: ALDISERT, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on September 22, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 31, 1980, be, and the same is hereby reversed insofar as it denied attorney's fees for work performed in exhausting the union's internal procedures for challenging the election and in filing a complaint with the Secretary of Labor, affirmed insofar as it denied attorney's fees for the period after the Secretary received the complaint and decided to institute the lawsuit which led to a settlement, and the cause remanded to the said District Court for the determination of the amount of attorney's fees in accordance with the opinion of this Court and the opinions of this Circuit pertaining to the fixing of attorney's fees.

ATTEST:

/s/ Sally Irwin
Clerk

December 16, 1981

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1032

RAY MARSHALL, Secretary of Labor,
United States Dept. of Labor
EDWARD SADLOWSKI,
Intervenor plf.

ANTHONY TOMKO,
Intervenor plf.

VS.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
(District 15) (District 31)

EDWARD SADLOWSKI, Intervenor above named, and the following counsel for SADLOWSKI: JOSEPH L. RAUH, JR., LEON DESPRES, KENNETH J. YABLONSKI and JUDITH SCHNEIDER,

Appellants

(D.C. Civil No. 73-0957)

On Appeal from the United States District Court
For the Western District of Pennsylvania

Present: ALDISERT, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on September 22, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 31, 1980, be, and the same is hereby reversed insofar as it denied attorney's fees for work performed in exhausting the union's internal procedures for challenging the election and in filing a complaint with the Secretary of Labor, affirmed insofar as it denied attorney's fees for the period after the Secretary received the complaint and decided to institute the lawsuit which led to a settlement, and the cause remanded to the said District Court for the determination of the amount of attorney's fees in accordance with the opinion of this Court and the opinions of this Circuit pertaining to the fixing of attorney's fees.

One-half of the costs ($1,246.50) taxed against United Steelworkers of America and directing that the parties bear their own costs in the District Court proceedings subsequent to the filing in the District Court of the Application for Attorneys Fees in January, 1975.

ATTEST: /s/ Sally Mirvos
SALLY MIRVOS
Clerk

January 7, 1982

APPENDIX K

SUPREME COURT OF THE UNITED STATES

No. A-767

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

EDWARD SADLOWSKI, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1982.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 5th day of March, 1982.

Opposition

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No. 81-1906

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

EDWARD SADLOWSKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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29 U.S.C. 483 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1906

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, PETITIONER

v.

EDWARD SADLOWSKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that a union member who files a complaint with the Secretary of Labor challenging a union election and then intervenes in the Secretary's suit, filed under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481-483, to set aside the election, can recover from the union the attorney's fees he incurred in exhausting union remedies and filing the complaint (but not any fees incurred after the Secretary received the complaint).

1. Respondent Sadlowski was defeated in an election for the position of District Director in District 31 of the petitioner, United Steelworkers of America. He asserted that the election was tainted by fraud and other activities that are illegal under Title IV. With the assistance of counsel, Sadlowski exhausted his remedies within the union. He

then filed a complaint with the Secretary of Labor, seeking to have the Secretary file suit to overturn the election (Pet. App. 4a). Only the Secretary may bring such a suit (see 29 U.S.C. 482, 483; *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964)), although a union member may intervene in the action (*Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972)). The Secretary may not sue to set aside an election unless a union member has exhausted internal union procedures and filed a complaint with the Secretary, and any such suit must be limited to claims raised in "some discernible fashion" by the complainant before the union. 29 U.S.C. 482; *Hodgson* v. *Local 6799, United Steelworkers of America*, 403 U.S. 333, 341 (1971).

In this case, the Secretary, after receiving Sadlowski's complaint and conducting his own investigation, sued in the United States District Court for the Western District of Pennsylvania, seeking to set aside the District 31 election. Sadlowski intervened. The suit was settled before trial, with petitioner agreeing to hold a new election, which Sadlowski won, in District 31 (Pet. App. 4a-5a).

After the new election, the private respondents—Sadlowski and his attorneys—sought attorney's fees from petitioner. The district court denied their application for attorney's fees (Pet. App. 154a-158a), but the court of appeals reversed (*id.* at 94a-136a). The court of appeals held that an award of attorney's fees to a union member who successfully challenges a union election is not barred by Title IV (*id.* at 98a-117a) and would be consistent with the "common benefit" exception to the general rule that parties cannot recover attorney's fees (*id.* at 117a-135a, citing *Hall* v. *Cole*, 412 U.S. 1 (1973), and *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 257-259 (1975)). The court of appeals remanded the case to the district court to consider "[w]hether an award [to Sadlowski] is warranted and, if so, the amount of such award" (Pet. App. 136a).

Petitioner then sought review in this Court. In response to the Court's request, the Secretary filed a memorandum in which he agreed that the court of appeals' decision merited review. The Court, however, denied the petition for a writ of certiorari, with three Justices dissenting (Pet. App. 89a-93a).

On remand, the district court again denied attorney's fees (Pet. App. 19a-63a). The court of appeals affirmed in part and reversed in part. It held that the private respondents were entitled to attorney's fees only for their efforts in connection with the exhaustion of union remedies and the filing of the complaint. The court of appeals denied attorney's fees for the period after the Secretary received the complaint (*id.* at 9a-17a). The court again remanded for a determination of the amount of attorney's fees to be awarded (*id.* at 17a-18a).

2. In light of the court of appeals' decision on the second appeal, and the Secretary's experience in administering Title IV in the five years since the court of appeals' first decision, we do not believe that this case now merits this Court's review. The Secretary's principal reason for urging review of the court of appeals' first decision was his concern that the prospect of attorney's fee awards would discourage unions from settling Title IV suits (77-643 Mem. of Sec. of Lab. 5; see *Wirtz* v. *Local 153, Bottle Blowers Association*, 389 U.S. 463, 472 (1968), quoting *Calhoon* v. *Harvey, supra*, 379 U.S. at 140 ("The objective [of Title IV] is not a lawsuit but to 'aid in bringing about a settlement through discussion before resort to the courts.' ")). The Secretary also noted his concern that the expectation of attorney's fee awards would encourage excessive intervention in Title IV actions (77-643 Mem. of Sec. of Lab. 4).

Because several years have elapsed since the government last took a position on this issue before this Court, the Secretary has reevaluated the practical impact of the award of attorney's fees to Title IV intervenors. The Secretary

informs us that his experience under the court of appeals' first decision has not borne out the concerns he expressed when this case first came before the Court. In the Secretary's view, the court of appeals' first decision in this case—and the decisions of the two other courts of appeals that have considered this issue, both of which are consistent with the court below (see *Rollison* v. *Hotel Employees Local 879*, Nos. 80-3498, 80-3495 (9th Cir. May 18, 1982); *Donovan* v. *Local 70, International Brotherhood of Teamsters*, 661 F. 2d 1199, 1202-1203 (9th Cir. 1981); *Usery* v. *Local 639, International Brotherhood of Teamsters*, 543 F. 2d 369, 383-388 (D.C. Cir. 1976), cert. denied, 429 U.S. 1123 (1977))—have not in fact hampered his ability to settle Title IV cases. Moreover, the Secretary has no information suggesting that any increase in the number of Title IV intervenors is attributable to the prospect of attorney's fees. The court of appeals' narrow second decision in this case—permitting attorney's fees only for the period before the Secretary receives the complaint—is, in the Secretary's judgment, unlikely to create any additional difficulties. It is therefore the Secretary's conclusion that the enforcement of Title IV will not be impaired by denying review of the court of appeals' decision.

We emphasize that, contrary to some suggestions in the petition, this case does not present broader issues concerning the award of fees for the period after the union member's complaint has been filed with the Secretary.[1] The court of appeals denied the private respondents' request for fees accrued during that period, and they have not sought review of that aspect of the court's decision. After the court of

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[1] As we explained in our initial filing in this case (77-643 Mem. of Sec. of Lab. 5-7), the award of attorney's fees to intervenors for later stages presents special concerns that may warrant a different rule.

appeals' first decision, of course, it was not clear that the ultimate holding in this case would be so limited. Moreover, since the Secretary brought suit before petitioner agreed to hold a new District 31 election, this case does not present any issue concerning the award of attorney's fees in a case in which a settlement is reached before the Secretary has sued.

3. Finally, as we have noted, three courts of appeals have now agreed that attorney's fees may be awarded to Title IV intervenors. See *Rollison* v. *Hotel Employees Local 879, supra; Donovan* v. *Local 70, International Brotherhood of Teamsters, supra; Usery* v. *Local 639, International Brotherhood of Teamsters, supra*. No court of appeals has reached a contrary conclusion. Because of the narrowness of the court of appeals' holding in this case, the absence of a conflict among the circuits, and the lack of any evidence that the enforcement of Title IV is adversely affected by making attorney's fees available to intervenors, we believe that the court of appeals' decision does not merit review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1982

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Opposition

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No. 81-1906

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI, JOSEPH L. RAUH, JR.,
LEON DESPRES, KENNETH YABLONSKI,
JUDITH SCHNEIDER,

and

RAYMOND DONOVAN, Secretary of Labor,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS EDWARD SADLOWSKI, JOSEPH L. RAUH, JR., LEON DESPRES, KENNETH YABLONSKI AND JUDITH SCHNEIDER IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Title IV of the Labor-Management Reporting and Disclosure Act of 1959 does not preclude a rank and file union member who intervenes in the Secretary of Labor's successful election-contest action against the union from obtaining attorneys' fees for that part of his counsel's earlier assistance which consisted of exhausting internal union remedies and preparing his complaint to the Department of Labor and which were jurisdictional prerequisites to a subsequent suit by the Department of Labor.

2. With regard to the court of appeals' finding of a common benefit:

A. Whether the court of appeals erred in holding that an intervenor may obtain attorneys' fees if his counsel's legal services materially assisted in bestowing a common benefit to the union membership.

B. Whether the court of appeals erred in concluding that vindication of the right to fair and free elections was a common benefit conferred on the union membership.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1906

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI, JOSEPH L. RAUH, JR.,
LEON DESPRES, KENNETH YABLONSKI,
JUDITH SCHNEIDER,

and

RAYMOND DONOVAN, Secretary of Labor,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENTS EDWARD SADLOWSKI, JOSEPH L. RAUH, JR., LEON DESPRES, KENNETH YABLONSKI AND JUDITH SCHNEIDER IN OPPOSITION

Respondents Edward Sadlowski, Joseph L. Rauh, Jr., Leon Despres, Kenneth Yablonski and Judith Schneider submit this Brief in opposition to the petition of the United Steelworkers of America for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit issued on December 16, 1981 and amended January 7, 1982.

COUNTERSTATEMENT OF THE CASE

Respondents rely upon the statement of facts contained in the two opinions of the Court of Appeals in this case (Pet. App. at 4a-5a, 95a-98a, 108a-114a). The basic facts are as follows:

In February, 1973 respondent Edward Sadlowski, a rank and file member, lost an election for the directorship of District 31 of the petitioner, the United Steelworkers of America ("Steelworkers"). District 31 is the largest district in the Steelworkers and included 130,000 members in Illinois and Indiana; its director sits on the Steelworkers' International Executive Board. The supposed winner in that election was the retiring incumbent's hand-picked choice, backed by the Steelworkers' hierarchy as the "official family" candidate. Shortly thereafter Sadlowski retained counsel, respondent Leon Despres, to supervise the investigation of voting fraud allegations, to aid him in exhausting the internal administrative remedies required by the Steelworkers' constitution, and to pursue a complaint to the Department of Labor. Within the ten-day time limit imposed by the Steelworkers' constitution Sadlowski filed a protest with the appropriate union authorities; they rejected the protest. An unsuccessful appeal, with Despres' advice, was then taken to the Steelworkers' International Executive Board.

Having thus exhausted his union remedies, Sadlowski filed a timely complaint, prepared by Despres, with the Secretary of Labor pursuant to Title IV of the Labor-Management and Reporting Disclosure Act ("LMRDA"), 29 U.S.C. § 482. The Department of Labor then conducted an investigation of its own. After that, and following several months delay, during which it heard opposing presentations by a battery of five lawyers for the Steelworkers and by respondent Rauh for Sadlowski, Labor brought an action in the United States District Court for the Western District of Pennsylvania against the petitioner union seeking to overturn the election on grounds of certain voting irregularities.

The district court granted Sadlowski's motion to intervene as a plaintiff, as permitted by *Trbovich* v. *United Mineworkers*, 404 U.S. 528 (1972). Subsequently, after vigorous discovery in which Sadlowski's counsel participated, a settlement was reached whereby the Steelworkers agreed to hold a new election to be supervised by the Secretary and the District Court. The vote reported by the Steelworkers in the first election was: Evett, the candidate of the Union's "official family," 23,394, and Sadlowski, 21,606. In the rerun election in November 1974, Sadlowski won with a margin of almost two-to-one.

After the new election results were certified by the District Court, Sadlowski's counsel submitted a verified application for attorneys' fees on January 31, 1975. The district court then dismissed the application, ruling, as a matter of law, that Sadlowski was not entitled to any attorneys' fees. The Court of Appeals for the Third Circuit reversed that ruling and ordered the District Court to determine the appropriate fees. After this Court denied a petition for a writ of certiorari,[1] the magistrate to whom the case was assigned after remand (and who had previously and erroneously recommended dismissal for lack of statutory authorization) reviewed the fee application and the record on remand and recommended that the application be denied in its entirety. In making that recommendation the magistrate applied the standard whether the assistance of counsel was absolutely necessary to carry the Sadlowski protest effectively through the union's internal procedures and then to the Secretary of Labor. The same district court then adopted the magistrate's report and ruled that no attorneys' fees whatsoever should be awarded.

The Court of Appeals for the Third Circuit has now reversed that ruling in part and remanded the case for

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[1] United Steelworkers v. Sadlowski, 435 U.S. 977 (1978) (No. 77-643).

the award of attorneys' fees for Sadlowski's counsel's assistance in exhausting internal union remedies and preparing the approximately 100-page complaint and supporting materials to the Department of Labor. No award was allowed for work performed in influencing Labor to bring suit and in connection with Sadlowski's intervention in the court suit through the settlement process and rerun election. On remand, respondent Despres has submitted a memorandum and affidavit seeking $12,125 in attorneys' fees; petitioner has suggested that the district court awarded Mr. Despres $1,881.25. No fees are being sought for litigating the attorneys' fee issue. The amount of fees to be awarded is now before the District Court for disposition.

REASONS FOR DENYING THE WRIT

Further review of this case is even less warranted today than when the Steelworkers first filed a petition for a writ of certiorari over four years ago. In its current petition petitioner challenges for a second time the initial 1977 decision of the Court of Appeals. Despite the passage of time, no federal appellate court decision conflicts with the Third Circuit's position; in contrast, the Ninth and District of Columbia Circuits have reached decisions absolutely consistent with the instant case. *Donovan* v. *Local Union 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 661 F.2d 1199 (9th Cir. 1981) (*"Local Union 70"*); *Usery* v. *Local Union No. 639, Internatl. Broth. of Teamsters, Etc.*, 543 F.2d 369 (D.C. Cir. 1976), *cert. denied sub nom. Local Union No. 639* v. *Marshall*, 429 U.S. 1123 (1977) (*"Local 639"*).

Furthermore, the decision of the Court of Appeals is merely a straightforward application of previous decisions of this Court. Its most recent decision is very narrow. It simply holds that fees can be awarded to intervenor's counsel for work performed *up to the filing of a complaint with the Secretary of Labor* where that work,

as a matter of fact, materially assisted the conferring of a common benefit—*i.e.*, the vindication of the union membership's right to a free and fair election. Thus, the decision has limited practical significance beyond the discrete facts of this Title IV case. Plenary review by this Court in such circumstances would be wholly unwarranted.

I. TITLE IV OF THE LMRDA DOES NOT PRECLUDE THE AWARD OF ATTORNEYS' FEES IN THESE CIRCUMSTANCES

(A) Petitioner has recycled the argument it previously presented to this Court that Title IV of the LMRDA should be interpreted to preclude the award of attorneys' fees to successful intervenors such as respondent Sadlowski. (Pet. 9-16.) Petitioner bases its argument on this Court's decisions in *Trbovich* v. *United Mineworkers*, 404 U.S. 528 (1972); *Hall* v. *Cole*, 412 U.S. 1 (1973); and *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), as well as Justice White's dissent to the denial of petitioner's previous petition for a writ of certiorari in 1978. (Pet. App. 89a-93a). However, the Court of Appeals' holding is entirely consistent with the previous decisions of this Court.

Petitioner argues that "Title IV of the LMRDA establishes a remedial scheme that leaves no room for a private claim for attorneys' fees." (Pet. 9.) The Court of Appeals in its first opinion in this case (Pet. App. 99a-104a) correctly rejected that argument.[2] This Court's decisions in *Hall* and in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), demonstrated that the absence of specific statutory authorization for attorneys' fees does

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[2] In so doing, the court of appeals took note of (Pet. App. 102a, 104a), and reached a conclusion consistent with, the only previous appellate consideration of the question, Usery v. Local Union 639, Internatl. Broth. of Teamsters, 543 F.2d 369 (D.C. Cir. 1976), *cert. denied sub nom.* Local Union No. 639 v. Marshall, 429 U.S. 1123 (1977) (*"Local 639"*).

not preclude such an award.[3] Indeed, *Hall* specifically addressed the propriety of an award of fees under the LMRDA, in a suit by a union member under Title I challenging efforts by his union to curb his exercise of free speech rights. This Court believed that to deny an award of fees "would be tantamount to repealing [the LMRDA] by frustrating its basic purpose." *Hall*, 412 U.S. at 13.

Petitioner also contends that the enforcement structure of Title IV has been specified in such "meticulous detail" that pursuant to this Court's analysis in *Fleischmann Distilling Corp., supra*, preclusion of other remedies should be implied. (Pet. 10.) To the contrary, Title IV has been the subject of significant judicial supplementation. In *Trbovich, supra*, this Court held that union member intervention in suits brought by the Secretary for violation of Title IV was not precluded by the fact that actions by the Secretary are the exclusive post-election remedy provided for by the statute. *Trbovich* was extended in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), which held that union members are entitled to a state-

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[3] Petitioner asserts that the rejection by Congress of an alternative proposal which provided for union member suits under Title IV supports its statutory preclusion position. (Pet. 9-10.) Both the Court of Appeals here, as well as the District of Columbia Circuit in *Local 639*, found that the legislative history of Title IV, as analyzed by this Court in *Trbovich*, does not offer the affirmative guidance petitioner claims that it does. *See* Pet. App. 101a-103a; *Local 639*, 543 F.2d at 587. In short, the two courts recognized that Congress' undiscussed and unexplained adoption of one enforcement scheme over another does not represent the "definite and absolute setting of the Congressional face against the giving" of such relief required by *Hall*. *See* 412 U.S. at 9. *See also* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 852 (1960) ("because much of the bill was written on the floor of the Senate or House of Representatives and because so many sections contain calculated ambiguities of political compromise . . ., the courts would be well advised to seek out the underlying rationale without placing great emphasis on close construction of the words.").

ment of supporting reasons where the Secretary decides not to pursue the union member's complaint. In addition, despite the absence of a statutory provision for settlements, many cases, such as the instant one, have been settled short of actual trial, and this Court has stressed the ameliorative function of the Secretary in encouraging settlements. *See Calhoon* v. *Harvey*, 379 U.S. 134, 140-41 (1964). Other courts have read a "waiver" procedure into the statute with respect to the 60-day limitations period of Section 402 to afford time to negotiate settlements, and thereafter approved the resulting disposition as in conformity with Title IV. *See Hodgson* v. *Machinists Lodge 851*, 454 F.2d 545 (7th Cir. 1971). *See also Marshall* v. *Local Union 1374, International Association of Machinists and Aerospace Workers*, 558 F.2d 1354 (9th Cir. 1977) (interpreting 60-day limitation as non-jurisdictional to best serve the purposes of the statute). In addition, at the remedial stage, courts have defined the timing, scope, and procedures of the new supervised election, and have entered orders embodying a broad range of ancillary relief to insure the integrity of the contest. *See Local 639*, 543 F.2d at 388.

As the Third Circuit recognized, the "initial burden of enforcement falls upon the individual member, and the Secretary's role is defined by those efforts." (Pet. App. 105a.) Thus, the entire post-election scheme of Title IV, upon which petitioner bases its argument, is dependent on the diligent and effective effort on behalf of a union member such as respondent Sadlowski. The union member has the responsibility to secure the ferreting out of the election irregularity, present it to the union in conformity with the union's procedures, and if relief is not forthcoming there, file a formal complaint to the Secretary of Labor. The union member's preservation of all election defects is a prerequisite to government intervention. The Secretary may not seek to avoid an election on bases not raised in "some discernible fashion" by the union member to the union, *Hodgson*

v. *Local 6799, Steelworkers*, 403 U.S. 333, 340-41 (1971), or which the union did not have a fair opportunity to consider and redress, *Wirtz* v. *Local 125, Laborers*, 389 U.S. 477, 484 (1968). It is, consequently, quite appropriate that under the narrow holding of this case, the Third Circuit has permitted the award of attorneys' fees in connection with exhaustion of union remedies and the preparation of a 100-page complaint to the Department of Labor, particularly where, as here, the election area and membership [130,000 members] are large and the time for protest is only ten days. As the court of appeals recognized:

> "quick action and skillful advocacy are probably most important at the initial stages of the enforcement scheme, when infractions must be identified, a bill of particulars formulated, the internal union procedures exhausted and a complaint drafted for presentation to the Secretary. Prompt, thorough and proper action in the earliest stages is essential to vindication of Title IV rights, since preservation of all election defects is a prerequisite to government intervention."

(Pet. App. 12a-13a, *quoting* Pet. App. 106a.)

(B) Petitioner unsurprisingly places great reliance upon and quotes extensively from the dissent to the earlier denial of a writ of certiorari in this case. (Pet. 14.) Petitioner then argues that the instant case demonstrates the validity of Justice White's concerns that the Court of Appeals' first opinion threatens to upset the delicate compromise reached in *Trbovich*. (*Id.* at 14-15.) Petitioner's argument is misplaced.

There is no evidence—and petitioner has cited none—that respondent Sadlowski's intervention prevented the successful conclusion of the instant litigation. The evidence is that respondent Sadlowski's efforts assisted, not hindered, the results achieved. As the court of appeals found:

> "The chief trial attorney for the Department of Labor stated in an affidavit that Sadlowski's counsel had performed a valuable service both to his client and to the Department. Further, the compliance officer in charge of the investigation candidly conceded in a deposition that of the 64 locals investigated by his team 59 were selected on the basis of Sadlowski's complaint." (Pet. App. 13a).

The duration of the attorneys' fees portion of this case, from January, 1975 to date, is attributable to the "long march" of discovery undertaken by petitioner (approaching that for a major antitrust case), its sponsorship of an erroneous "but for" standard and its dogged resistance to the payment of attorneys' fees, particularly to an insurgent candidate who challenged successfully the union's "official family."

Moreover, the Department of Labor's fears that the possibility of attorneys' fees will discourage settlement are wholly without foundation. In response to the court's question during oral argument before the Third Circuit, counsel for the Department of Labor was forced to concede that no study has been made that demonstrates or even supports that the award of attorneys' fees has had any effect on settlements.[4]

Finally, despite the passage of time since this case was previously before this Court, no conflict has developed between the courts of appeals. In a recent decision, the Ninth Circuit recognized that "[b]y presenting the claims in an inevitably somewhat different manner the union member frequently can be of valuable assistance to the Secretary." *Local Union 70*, 661 F.2d at 1203. The court of appeals affirmed the award of $1,500 in attorneys' fees because of "the acknowledgment made by the Secretary's counsel of the 'ongoing and vital' assist-

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[4] The relevant portion of the transcript of oral argument is reprinted in the appendix to this Brief.

ance provided by the Intervenor in the preparation and course of this litigation." *Id.*

As it has evolved, this is a very narrow case, with a narrow, although hardly unique, result. The court of appeals' decision permits an award of attorneys' fees solely for prelitigation activities that materially assisted the conferring of a common benefit, where, thereafter, the Secretary of Labor subsequently brought suit,[8] intervention occurred, and a successful conclusion was reached. Such a case is not an appropriate candidate for further review.

II. INTERVENOR MATERIALLY ASSISTED THE CONFERRING OF A COMMON BENEFIT

(A) Petitioner challenges (Pet. 16-19) the court of appeals' finding that intervenor could be awarded attorneys' fees if he materially assisted the conferring of a common benefit. (Pet. App. 9a-10a.) The court of appeals, however, merely followed the approach utilized by the District of Columbia Circuit in a previous and similar case. In contrast, the test petitioner has sponsored in this litigation—that the intervenor must demonstrate that "but for" his legal services the asserted benefit would not have been realized—is both without precedent and impossible to meet as a practical matter.

The district court, in rejecting any claim for attorneys' fees, had adopted the "but for" standard advanced by

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[8] It would appear that litigation must ultimately occur before attorneys' fees can be awarded for pre-complaint activities. *Hall* repeatedly refers to the existence of litigation as the basis for the exercise of the court's equitable power to award fees. Hall v. Cole, 412 U.S. 1, 5, 7, 9, 13-14 (1973). *See* Mezo v. International Union, United Steelworkers, 558 F.2d 1280 (7th Cir. 1977). Consequently, in contrast to the Department of Labor's and Justice White's speculations, the possibility of attorneys' fees might encourage, not discourage, prelitigation settlements.

the Steelworkers. In reversing that holding, the court of appeals endorsed respondent Sadlowski's position that "such a standard would impose a burden in the context of Title IV challenges which would be impossible to meet and would result in no fee recovery by intervenors, thereby emasculating any theoretical right to intervene." (Pet. App. 9a.) The standard that the court of appeals instead adopted—*i.e.*, that the legal work be of material assistance—is not only logical but in line with the standard adopted by the only other appellate court to consider, prior to this case, the propriety of awarding attorneys' fees in Title IV cases. In the *Local 639* decision, the District of Columbia Circuit found that "[i]t is not difficult to conceive of examples of material assistance to the Secretary and the court in the vindication of the interest —of the public and the union rank and file—in union democracy." *Local 639*, 543 F.2d at 384. In finding that fees could be awarded, the District of Columbia Circuit also instructed that the assistance of intervenor "may be of considerable assistance to the court and the Secretary, warranting assessment against the party ultimately benefitted, the union membership." *Id.* at 388. *See also Wechsler* v. *Southeastern Properties, Inc.*, 506 F.2d 631 (2d Cir. 1974) (applying material assistance standard).

Moreover, the Ninth Circuit, in affirming the award of fees in a Title IV case, did not apply any "but for" standard but upheld an award on the basis of "ongoing and vital assistance" by intervenor's counsel. *Local Union 70*, 661 F.2d at 1203.

Petitioner attempts to construct a conflict between the courts of appeals by comparing the court of appeals' decision here with those of the Second and Seventh Circuits in *Grace* v. *Ludwig*, 484 F.2d 1262 (2d Cir. 1973), *cert. denied*, 416 U.S. 904 (1974) and *Bender* v. *Crown*, 551 F.2d 169, 171 (7th Cir. 1977). Petitioner cited

neither decision to the court of appeals;[6] no conflict, in fact, exists. Both *Grace* and *Bender* involved district court complaints seeking attorneys' fees based upon an intervenor's participation in an administrative Securities and Exchange Commission proceeding which resulted in a settlement at the agency. The factual circumstances of the SEC proceeding were highly complex,[7] and the courts' decisions are clearly limited to those facts and merely held that in the circumstances present in those cases no special circumstances existed to justify an award of fees. *Grace*, 484 F.2d at 1268-69; *Bender*, 551 F.2d at 171. Thus, *Grace* and *Bender* do not stand in conflict with either the Third Circuit's decision here, the District of Columbia Circuit's decision in *Local 639*, or the Ninth Circuit's decision in *Local Union 70*.

(B) As it did in its previous petition, petitioner also challenges the court of appeals' conclusion that a common benefit was conferred in light of the facts of this case. (Pet. at 19-24.) Petitioner claims that the court of appeals' approach conflicts with this Court's discussion of the common benefit doctrine in *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) and represents a resurrection of the now-discredited "private attorney general" rationale for attorneys' fees. Petition-

[6] In the lower courts, petitioner based its "but for" standard exclusively upon the Third Circuit's decision in Wolf v. General Motors-United Autowkrs., 569 F.2d 1266 (3d Cir. 1978). The Third Circuit, however, did not find the decision applicable here; this is particularly significant because Judge Aldisert was on the panel here and in *Wolf*.

[7] Fee applicants in the cases represented minority stockholders of a subsidiary corporation who intervened in an SEC proceeding arising from the parent corporation's application for an exemption to permit it to absorb the subsidiary by a "short form" merger. The intervenors claimed the application was part of a fraudulent scheme. Prior to any administrative decision, the application was withdrawn. Grace v. Ludwig, 484 F.2d 1262, 1263-64 (2d Cir. 1973), *cert. denied*, 416 U.S. 904 (1974).

er's argument is faulty; in fact, the court of appeals has merely applied the standards that have emerged from the decisions of this Court, such as *Hall*, and other courts of appeals which have considered this issue. Further review of this portion of the decision is as unwarranted now as it was when petitioner first sought review.

In its recent opinion, the court of appeals reaffirmed its conclusion that a common benefit was conferred in this case in the vindication of union members' right to a free and fair election:

> "In *Hall* v. *Cole*, 412 U.S. 1, 8 (1973), the Supreme Court noted that an individual, by vindicating his own right to free speech under Title I of the LMRDA, 'dispels the "chill" cast upon the rights of others.' *Brennan*, [Pet. App. 129a]. That the individual who brought suit also receives a direct personal benefit from it is of no matter when considering the '"implications for the future conduct of the union's affairs."' *Hall*, 412 U.S. at 8 *quoting Yablonski* v. *United Mine Workers of America*, 466 F.2d 424, 431 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973). The common benefit from dispelling a chill on free speech is exactly parallel to the common benefit Sadlowski conferred on the Steelworkers by insisting on a fair election." (Pet. App. 16a.)

Moreover, the court of appeals here recognized that it was reaching the same conclusion as the District of Columbia Circuit in the *Local Union 639* case. (Pet. App. 16a-17a.)

The discrete factual challenges made by petitioner to the Third Circuit's common benefit analysis further illustrates the inappropriateness of plenary review. Petitioner's constant reminder that respondent Sadlowski received a direct benefit, *i.e.*, he won the election, is directly answered by this Court's *Hall* decision, which

explicitly recognized that a personal benefit accruing to the fee claimant does not bar the conferring of a common benefit under the LMRDA to form the basis for an award of attorneys' fees. *Hall*, 412 U.S. at 8-9. *See also Christopher* v. *Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir. 1981) (attorneys' fees awarded under common benefit rationale where substantial service rendered to all members of local union even though plaintiff received monetary judgment). Petitioner's argument that the approximately $1,800 to $12,000 now at issue in this case cannot be shifted with some exactitude to those who benefitted lacks all common sense. (Pet. 21-22.) Although the court of appeals stated that the 130,000 members of District 31 received the greatest benefit, it also held, correctly, that a benefit was conferred on all union members in this case. (Pet. App. 17a; Pet. App. 131a-132a.) As the court found, respondent Sadlowski was directly responsible for instituting and completing the process necessary for the Secretary of Labor taking action to preserve the right to free and fair elections. Operating under a stringent ten-day time limit imposed by the Steelworkers, in the Third Circuit's words:

> "Sadlowski's counsel played a vital role in the statutory enforcement scheme of Title IV. Through the efforts of Despres, evidence was preserved and marshaled and a persuasive case was presented to the Secretary." (Pet. App. 17a.)

Petitioner's complaint that it is inappropriate to assess each union member a maximum of $.01 that is now at issue is not an argument warranting review by this court.[8]

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[8] Petitioner, in part, seeks to avoid fees because of its own administrative decision not to permit Steelworkers' districts to have their own treasuries. (Pet. 21-22.) It offers no support for its position that its commingling of various districts' funds can defeat

Petitioner again attempts to create a conflict between the courts of appeals (Pet. 23-24) by asserting that the Third Circuit's shift of fees to petitioner's treasury is at odds with at least two post-*Alyseka* decisions, *American Association of Marriage and Family Counselors* v. *Brown*, 593 F.2d 1365 (D.C. Cir. 1979) and *Southeast Legal Defense Group* v. *Adams*, 657 F.2d 1118 (9th Cir. 1981). There is, however, no "square conflict" as petitioner suggests. In *Brown*, Judge Leventhal, the author of *Local 639*, writing for the panel, found an absence of an equitable basis for fee-shifting when the plaintiff association successfully prevented the government termination of reimbursement benefits to users of certain counseling services. Skirting the difficult issue posed by the fact that the users of the program were not parties, Judge Leventhal affirmed the denial of fees because the association was the primary beneficiary, as it preserved a source of income to its members, and could afford the fees, and the users' benefit was ancilliary, as their basic interest was in access to treatment rather than the mode of treatment proposed for elimination. 593 F.2d at 1368-69. In *Adams*, the court merely found that a class of beneficiaries of "all citizenry" or "all taxpayers in a state" was insufficiently distinct and made it impossible to shift the fee with any exactitude. 657 F.2d at 1122-23. Neither case bears any resemblance to the instant situation.[9]

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an award of attorneys' fees since only those that received the "greatest benefit" should pay. As the court of appeals concluded, the benefit conferred by respondent Sadlowski through the efforts of respondent Despres "redounded to the common good of all Steelworkers." (Pet. App. 17a.) Further, the Director of District 31 sits on the Steelworkers' ultimate policy-making body, the International Executive Board.

[9] In *Adams*, the court did award attorneys' fees under 42 U.S.C. § 1988 against the state defendants. The "common benefit" discussion occurred in the context of a cross-appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Number: 81-1032

RAY MARSHAL, Secretary of Labor, ETC., *et al.*

VS.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, ETC.

EDWARD SADLOWSKI, *et al.*,
Appellants

Hearing held in the above-captioned matter was held at the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, on Tuesday, September 22, 1981, beginning at or about 10:00 a.m., E.D.S.T., re-recorded and transcribed stenographically from an audio tape-recording by Dennis Corsi, Registered Professional Reporter, Notary Public in and for the Commonwealth of Pennsylvania, there being present:

BEFORE:

RUGGERO J. ALDISERT, Circuit Judge

A. LEON HIGGINBOTHAM, JR., Circuit Judge

DOLORES K. SLOVITER, Circuit Judge

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* * * *

[21] MR. DUBIN: May it please the Court, my name is Stanford Dubin and I'm representing the Secretary of Labor in this case. We're persuaded since the Court's first opinion that the effect of permitting the recovery of attorney's fees is of such significance as shown in this case, to interfere with the Secretary's ability to remain neutral and properly administer the act to—(Inaudible)—by this Court.

THE COURT: You are aware that this Court, a panel of this Court under our internal operating procedure cannot overturn a prior legal interpretation of another panel that has to go in bank. Are you aware of our internal—

MR. DUBIN: Yes, your Honor.

THE COURT: But, isn't that what your whole brief is directed to, asking a panel of this Court to do pre-[22] cisely that?

MR. DUBIN: Correct, to reconsider law.

THE COURT: Well, asking a panel of this Court to request the rest of the Court to take this—(Inaudible).

MR. DUBIN: Yes, your Honor. However, we are not concerned with the issue of the exact formula or standard to be used to determine such a fee award. The Secretary is opposed to an award for basically four reasons, the adverse effect on settlements that will result, the increased litigations subjecting the union and the Secretary to an increased burden, the unnatural posture that the parties are placed into a fee litigation and the rehashing of the merits. Most important, though, to the Secretary, is the adverse effect on settlements. The unions will be less inclined to settle with the possibility of a substantial fee award. A major stumbling block has occurred when a union is—

THE COURT: Well, counsel, I really had been inclined to not get involved on your argument before the panel, but since you've made this statement, what studies do you have which establish that unions are less inclined

to settle if they may be subject to a substantial counsel fee? Now, I know of no study in antitrust, securities, any other field, so what is the Department of Labor's empirical study to suggest that we take judicial notice of that proposition?

[23] MR. DUBIN: We have no studies to date your Honor.

THE COURT: Thank you.

MR. DUBIN: However, it has been our experience that there has been less settlement.

THE COURT: They haven't published that?

MR. DUBIN: No, your Honor. The settlements do have significant value in this area, because the practical importance of a speedy disposition—

THE COURT: What was the Department of Labor's position when a petition for—(Inaudible)—was filed after the first case?

MR. DUBIN: At that time, we decided to take a position against attorney's fees.

THE COURT: Pardon?

MR. DUBIN: At that time—At the actual time, we took no position.

THE COURT: You took no position?

MR. DUBIN: Right.

* * * *

Supplemental Brief

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI, JOSEPH L. RAUH, JR.,
LEON DESPRES, KENNETH YABLONSKI,
JUDITH SCHNEIDER,

and

RAYMOND DONOVAN, Secretary of Labor,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL STATEMENT OF RESPONDENTS EDWARD SADLOWSKI, JOSEPH L. RAUH, JR., LEON DESPRES, KENNETH YABLONSKI AND JUDITH SCHNEIDER

Respondents Edward Sadlowski, Joseph L. Rauh, Jr., Leon Despres, Kenneth Yablonski and Judith Schneider submit this Supplemental Statement to their Brief In Opposition To The Petition of the United Steelworkers of America for a Writ of Certiorari.

On pages 11-12 of their Brief In Opposition, respondents stated that petitioner had not cited the decisions in *Grace* v. *Ludwig*, 484 F.2d 1262 (2d Cir. 1973), *cert. denied*, 416 U.S. 904 (1974) and *Bender* v. *Crown*, 551 F.2d 169 (7th Cir. 1977) to the Court of Appeals. The statement was an inadvertent mistake; in fact, petitioner

had cited those cases. Similarly, with respect to footnote 6 on page 12 of respondents' brief, petitioner had based its "but for" standard principally, but not exclusively, upon the Third Circuit decision in *Wolf* v. *General Motors-United Autoworkers*, 569 F.2d 1266 (3d Cir. 1978).

Respectfully submited,

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June, 1982

Petitioner's Reply Brief

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No. 81-1906

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI, JR., JOSEPH L. RAUH, JR., LEON DEPRES, KENNETH YABLONSKI, JUDITH SCHNEIDER, and RAYMOND DONOVAN, Secretary of Labor,
Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1906

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI, JR., JOSEPH L. RAUH, JR., LEON DEPRES, KENNETH YABLONSKI, JUDITH SCHNEIDER, and RAYMOND DONOVAN, Secretary of Labor,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The individual respondents (intervenor and his four attorneys) and the Secretary of Labor each have filed responses to the petition for a writ of certiorari. The individual respondents argue that none of the questions presented herein warrant review by this Court. In contrast, the Secretary's response, although denominated a "Memorandum in Opposition," addresses only one of the three issues raised by the petition for certiorari—the question whether the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") precludes the award of attorneys' fees to an intervenor in a suit brought by the Secretary of Labor under Title IV of the LMRDA. On that question, the Secretary does not express a view as to the correctness of the decision below, but argues only that the decision is not of such importance as to warrant review. The Secretary's Memorandum does

not discuss the remaining questions—questions that are not unique to the LMRDA but rather pertain generally to the scope of the "common benefit" exception to the American rule against the shifting of attorneys fees.

As we proceed to show, neither the individual respondents nor the Secretary have detracted from our showing that certiorari should be granted.

I. The Statutory Preclusion Issue

A. The individual respondents alone assert the correctness of the holding of the court below that a common benefit fee award "is not precluded by Title IV" (App. 136a). But they do not show how a private, monetary remedy to a candidate in a union election challenged under Title IV can be squared with Title IV's provision of only a public, equitable remedy—a rerun election—that is declared by § 403 of the LMRDA, 29 U.S.C. § 483, to be the "exclusive" remedy. Instead, like the court below, the individual respondents argue that Title IV "has been the subject of significant judicial supplementation" and that a fee award is consistent with this "judicial supplementation" rather than with the statute Congress wrote (Mem. at 6). The error of this argument was explained in the dissent from the denial of certiorari following the first appeal, which we quoted in our petition (at 14); we do not repeat that explanation here.

B. The Secretary contends that the lower court's holding on the statutory preclusion issue "does not merit review by this Court" in light of "the narrowness of the court of appeals' holding . . . and the lack of any evidence that the enforcement of Title IV is adversely affected by making attorney's fees available to intervenors" (Mem. at 5). We address these two reasons for opposing certiorari *seriatim*.

(i) The holding of the court below on the preclusion issue is a sweeping, rather than a "narrow" one, and in suggesting otherwise the Secretary seizes on factual cir-

cumstances which have no legal significance under the rationale below. The court of appeals' holding on the preclusion issue—which was stated in the court's first opinion and followed in the second—was that Title IV imposes no impediment to a common benefit fee award for *any* time an attorney for a candidate devotes to a Title IV case regardless of whether the time is devoted before, or after, the Secretary filed suit; with respect to all such time, entitlement to a fee turns solely on whether the attorney's efforts conferred a "common benefit" upon the union members. In the court's words, "[n]othing in either the statute or the legislative history of the LMRDA suggests to us the preclusion of the courts' traditional equitable power to provide *complete relief*" (App. 116a-17a; emphasis added). And following the first appeal, the court remanded this case to the district court to award fees to intervenor's attorneys for each and every hour they had devoted to this case—both before and after the filing of the complaint with the Secretary—which they could show redounded to the "common benefit" of the USWA membership.

To be sure, it was ultimately determined following remand that in this case intervenor's attorneys did not *in fact* confer a benefit upon USWA's membership (or render "material assistance" to the Secretary) except with respect to the work they did while intervenor was exhausting his internal union remedies and submitting a protest to the Secretary. It thus happens that the fee award here will be limited to the period of time up to the filing of intervenor's complaint with the Secretary. But that happenstance in no way affects the legal standard applied in this case—a legal standard which does not distinguish between pre-litigation and litigation services. And it is the legal standard whose correctness we challenge in the petition to this Court.

(ii) The Secretary's alternative basis for opposing certiorari on the statutory preclusion issue—that the award of fees to intervenors "ha[s] not in fact ham-

pered his [the Secretary's] ability to settle Title IV cases" (Mem. at 4)—is puzzling. Nine months earlier the same Secretary of Labor, represented by the same Solicitor of Labor, told the court of appeals that "it has been our experience that there has been less settlement" of Title IV cases as a result of the availability of fee awards to intervenors (*see* Br. of Individual Resps. at 3a).

But even if, as the Secretary now asserts, the availability of fee awards to intervenors would not make unions any less willing to settle than they would be if fee awards were not available—a proposition that runs contrary to common sense—it hardly follows, as the Secretary urges, that review is not warranted. For in any event it is clear that the availability of fee awards to private intervenors in Title IV actions will have a substantial impact on the treasury of labor unions called upon to defend fee claims (and, *a fortiori*, on unions required to pay fee awards).[1]

It was premisely to minimize the monetary impact upon unions of Title IV enforcement that Congress provided only a nonmonetary remedy for Title IV violations and that Congress conferred sole enforcement authority upon the Secretary of Labor, to the exclusion of private actions, as this Court recognized in *Trbovich v. Mine Workers*, 404 U.S. 528; and it was precisely because of this congressional intent that *Trbovich* held that intervention in Title IV actions must be "limited to the claims of illegality presented by the Secretary's complaint," *id.* at 532. Thus the holding of the court of appeals on the

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[1] For example, in *Marshall v. Teamsters Local 639*, No. 1963-72 (D.D.C. 1977), the district court ordered the local union defendant in that case to pay $35,000 in attorneys' fees to the intervenor. Similarly, in *Donovan v. Teamsters Local 326*, No. 80-181 (D. Del.), the local union paid close to $10,000 in fees to intervenor's counsel for his work in assisting intervenor to exhaust his internal union remedies, file a complaint with the Secretary, and assist in the supervision of a rerun election.

statutory preclusion issue indisputably has a substantial impact on the practical interests of unions—interests that Congress sought to protect in shaping and delineating Title IV's enforcement scheme.

II. The Common Benefit Issues

A. In our petition we demonstrated that the decision below, in holding that a common benefit fee claimant need not prove that but for his legal services the asserted benefit would not have been realized, is inconsistent with the rationale of the common benefit doctrine as developed in a series of decisions of this Court (Pet. at 16-18). The individual respondents—who alone discuss this issue—make no attempt to reconcile the decision below with the logic of the common benefit exception. Instead, they simply repeat the court of appeals' contention that a "but for" test is "impossible to meet as a practical matter" and thus would " 'emasculat[e] any theoretical right to intervene' " (Mem. at 10-11). As we explained in our petition, however, difficulty of proof is no reason to relax the requirement that a common benefit fee claimant, if he is to extract fees from persons who never retained him, must prove that his efforts in fact benefitted those against whom fees are to be taxed.

Respondents attempt to avoid the conflict between the decision below and the decisions of the Second and Seventh Circuits in *Grace v. Ludwig*, 484 F.2d 1262 (2d Cir. 1973), and *Bender v. Crown*, 551 F.2d 169 (7th Cir. 1977), by arguing that those latter cases presented "factual circumstances . . . [which] were highly complex, and the courts' decisions are clearly limited to those facts and merely held that in the circumstances present in those cases no special circumstances existed to justify an award of fees" (Mem. at 12).[2] But while respondents pretend otherwise, *Grace* and *Bender* articulated a legal

[2] As noted in Respondents' Supplemental Memorandum, correcting their Brief in Opposition (at 11-12 & n.6), USWA relied on *Grace* and *Bender* in the lower courts.

test that is applicable to every case in which a common benefit fee award is sought—a test that those courts found had not been met on the facts of those cases. And that legal test—in the Second Circuit's words, proof "that 'but for' the intervention" the benefit would not have been realized, *Grace*, *supra*, 484 F.2d at 1269—is precisely the test that the court below rejected. The decisions thus squarely conflict.

B. In our petition (at 19-23) we demonstrated that the decision below was inconsistent with this Court's common benefit decisions in a second respect: it authorizes a fee award from the treasury of USWA—an award that will have an equal impact on all members of USWA—notwithstanding the court of appeals' own finding that the "*greatest* benefit was conferred upon Union members in [District 31]" (App. 132a; emphasis in original). Once again, respondents make no attempt to reconcile the decision below with the decisions of this Court—particularly with the teaching of *Alyeska Pipeline v. Wilderness Society*, 421 U.S. 240, 265 n.39, that a common-benefit fee award must "operate to spread the costs of litigation *proportionately* among [the] beneficiaries" (emphasis added). Respondents argue that it is sufficient that the court of appeals found that USWA members outside of District 31 received *some* benefit, however ephemeral. But as the dissent from the denial of certiorari on the first appeal stated, this reasoning "represents logic squarely at issue with *Alyeska*'s construction of the common-benefit theory" (App. 92a).

Respondents attempt to dismiss the conflicting court of appeals decisions (discussed at Pet. 23-24), stating that those cases do not "bear[] any resemblance to the instant situation" (Mem. 15). But while the facts of those cases unquestionably are different, the legal principle is the same: in each case a common benefit fee award was denied notwithstanding the fact that those from whom fees were being sought had realized *some*

benefit, because the courts found that there were great variances in the quantum of benefit received by the various beneficiaries and that it was not possible to assess fees in proportion to the respective benefits received. Here, in contrast, the court of appeals has mandated a fee award that each USWA member will bear equally notwithstanding the court's own conclusion that a small portion of USWA's members received a benefit far greater in value than that received by the vast majority of members. Thus the decision below is inconsistent both with *Alyeska* and with the post-*Alyeska* decisions applying the proportionality requirement.

CONCLUSION

For the foregoing reasons, and those stated in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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